2971

No. 15104

United States
Court of Appeals
for the Ninth Circuit

ORIENTAL FOODS, INC., a corporation,
Appellant,

vs.

CHUN KING SALES, INC., and JENO F. PAULUCCI,
Appellees.

CHUN KING SALES, INC., and JENO F. PAULUCCI,
Appellants,

vs.

ORIENTAL FOODS, INC., a corporation,
Appellee.

Transcript of Record

In Three Volumes
Volume I.
(Pages 1 to 272, inclusive)

Appeals from the United States District Court for the Southern District of California, Central Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. —11-5-56

No. 15104

United States
Court of Appeals
for the Ninth Circuit

ORIENTAL FOODS, INC., a corporation,
Appellant,

vs.

CHUN KING SALES, INC., and JENO F. PAULUCCI,
Appellees.

CHUN KING SALES, INC., and JENO F. PAULUCCI,
Appellants,

vs.

ORIENTAL FOODS, INC., a corporation,
Appellee.

Transcript of Record

In Three Volumes
Volume I.
(Pages 1 to 272, inclusive)

Appeals from the United States District Court for the Southern District of California, Central Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

HARRIS, KIECH, FOSTER & HARRIS,
FORD HARRIS, JR.,
WALTER EUGENE TINSLEY,

417 South Hill Street,
Los Angeles 13, California.

For Appellee:

LYON & LYON,
LEWIS E. LYON,
ROBERT DOUGLAS LYON,

811 West Seventh Street,
Los Angeles 17, California.

WILLIAMSON, SCHROEDER, ADAMS
& MEYERS,
EVERETT J. SCHROEDER,

950 Pillsbury Building,
Minneapolis 2, Minnesota. [1] *

---

* Page numbering appearing at foot of page of original certified Transcript of Record.

In the United States District Court, Southern District of California, Central Division

Civil Action No. 17882-Y

CHUN KING SALES, INC., and JENO F. PAULUCCI, Plaintiffs,

vs.

ORIENTAL FOODS, INC., Defendant.

COMPLAINT

For infringement of United States Letters Patent Number 2,679,281 and for Unfair Competition and Trade Practices.

Plaintiffs Chun King Sales, Inc., and Jeno F. Paulucci, for causes of action and complaint against the Defendant allege as follows:

I.

Plaintiff Chun King Sales, Inc. is a corporation organized and existing under the laws of the State of Minnesota and it is duly licensed to transact business within the State of Minnesota and has its principal place of business at Duluth, County of St. Louis, Minnesota.

II.

Plaintiff Jeno F. Paulucci is a citizen of the United States of America and a resident of Duluth, County of St. Louis, Minnesota and is President of the Plaintiff, Chun King Sales, Inc. [2]

III.

Defendant Oriental Foods, Inc. is a corporation organized and existing under the laws of the State of California and has its principal place of business or one of its main business branches and a place of manufacture at 7272 East Gage Avenue, Bell (Bell Gardens), County of Los Angeles, California.

IV.

This Court has jurisdiction of this cause of action because the subject matter in controversy arises under the patent laws of the United States and because the acts of infringement hereinafter complained of were and are being committed in Los Angeles County, California, and because the parties to this action are residents of different states and because the amounts in controversy are well in excess of Three Thousand Dollars ($3,000.00).

V.

Plaintiff Jeno F. Paulucci conceived, developed and perfected certain novel and unique methods and apparatus for rigidly and positively securing cans together in an end-to-end relationship, whereby the handling and marketing of the same when filled with goods is facilitated.

VI.

Plaintiff Jeno F. Paulucci in cooperation with the Plaintiff, Chun King Sales, Inc. tested these methods and apparatus for use on a large-scale-production basis in order to determine whether

these methods and apparatus were uniquely adapted for securing cans together in an end-to-end [3] relationship so that it might become feasible and practical, for the first time in the marketing of canned goods, to ship and market such canned goods in combinations of two or more cans connected in an end-to-end relationship and as a single unit.

VII.

Through the development and perfection of these methods and apparatus by said Plaintiff Jeno F. Paulucci, the assembly, shipment, handling, display, and sale of canned goods in combinations of two or more cans rigidly and positively connected in an end-to-end relationship and as a single unit, became feasible and practical for the first time in history.

VIII.

Plaintiff, Jeno F. Paulucci, after investigating the probable patentability of these novel methods and apparatus, on May 14, 1952 filed an application, Serial Number 287,729, for United States Letters Patent through his attorney, said application later developing into United States Letters Patent Number 2,679,281 duly and legally issued to Jeno F. Paulucci on May 25, 1954. Said patent is directed toward the methods and apparatus conceived, developed, perfected and tested by said Plaintiff, Jeno F. Paulucci, as described in preceding paragraphs V, VI and VII. A soft copy of said patent is attached hereto and made a part hereof as Plaintiff's Exhibit Number 1.

IX.

Plaintiff, Jeno F. Paulucci, is the sole owner of the entire right, title and interest, both legal and [4] equitable, to said United States Letters Patent Number 2,679,281. Plaintiff, Jeno F. Paulucci, has made the Plaintiff, Chun King Sales, Inc., the exclusive licensee under said United States Letters Patent Number 2,679,281.

X.

Plaintiff, Chun King Sales, Inc., in cooperation with said Plaintiff, Jeno F. Paulucci, assembled, shipped, displayed, introduced and sold to the public for the first time, canned goods in combinations of two or more cans rigidly and positively connected together in an end-to-end relationship and as a single unit.

XI.

Since on or about January 1, 1952, Plaintiff, Chun King Sales, Inc., has conducted an extensive advertising campaign throughout the United States wherein the attention of the public has been directed to the assembly and display of canned Oriental-type foods by the Plaintiff, Chun King Sales, Inc., in two or more can units characterized by the uniquely secured end-to-end relationship of the can. In particular Plaintiff, Chun King Sales, Inc. has extensively advertised and displayed on television programs in California in the Los Angeles and San Francisco areas Oriental-type foods packed in two or more can units, the cans thereof being secured

in said end-to-end relationship in accordance with the disclosures of said United States Letters Patent Number 2,679,281.

XII.

As a result of such advertising and of the pioneering of the field by Plaintiff, Chun King Sales, Inc., in assemblying and offering for sale canned goods in such [5] units, the purchasing public has come to recognize canned goods, and especially canned goods of Oriental-type food, so assembled and offered for sale as having originated from the Plaintiff, Chun King Sales, Inc.

XIII.

Defendant, Oriental Foods, Inc., since the issue of said United States Letters Patent Number 2,679,281 and prior to the filing of this complaint, and within this District, has been and, on information and belief, still is infringing said United States Letters Patent Number 2,679,281 by making and/or procuring the apparatus and equipment, and by using and causing to be used said apparatus and equipment, as disclosed and claimed in said patent, and by using the methods disclosed and claimed in said patent to assemble combinations of two or more cans into a single unit wherein the cans are rigidly and positively secured in an end-to-end relationship.

XIV.

Defendant has had both actual and constructive notice of the issuance of said patent Number 2,679,281 and of its infringement by Defendant, but

nevertheless has continued to wilfully, wantonly and deliberately infringe said patent, and apparently will continue to wilfully and wantonly infringe this patent unless enjoined by this Court.

XI.

The Oriental-type foods sold by Plaintiff, Chun King, Sales, Inc., have enjoyed an enviable reputation for good quality and taste and the Plaintiff, Chun King Sales, Inc., through the extensive sales of food products [6] of such good quality over a long period of time, has acquired a valuable business reputation for manufacturing and selling only foods of high quality, and has developed valuable good-will throughout the purchasing public.

XVI.

Defendant, Oriental Foods, Inc., has studiously patterned the general dress, style, arrangement and appearance of assemblies of two or more cans of Oriental-type foods which it has sold, and is currently selling, after the general dress, style, arrangement and appearance of the combination units of two or more cans of Oriental-type foods sold by Chun King Sales, Inc. This patterning of the general dress, style, arrangement and appearance of its two or more can assemblies of Oriental-type foods after the general dress, style, arrangement and appearance of the combination units sold by Chun King Sales, Inc., was and is for the purpose of deceiving the purchasing public into believing it

is purchasing food products of the Plaintiff, Chun King Sales, Inc. while actually it is purchasing Defendant's competitive food products.

XVII.

As a result of the simulation by Defendant of the general appearance of the combination units of two or more cans of Oriental-type foods rigidly secured togther in end-to-end relationship as sold by Plaintiff, Chun King Sales, Inc., as defined in the immediately preceding paragraph, many of the purchasing public have been deceived and misled into purchasing Defendant's Oriental-type food products instead of the Oriental-type food products of Plaintiff, Chun King Sales, Inc., and have actually purchased Defendant's Oriental-type [7] food products in the belief they were purchasing Oriental-type foods products offered for sale by Plaintiff, Chun King Sales, Inc.

XVIII.

Defendant, Oriental Foods, Inc., has sold and is currently selling in its two or more can assemblies defined in the preceding paragraph XVI, Oriental-type food of an inferior grade and at a lower price as compared to that sold by Plaintiff, Chun King Sales, Inc., in its combination units referred to in said paragraph, and as a result has damaged the business reputation and good-will of Plaintiff, Chun King Sales, Inc., and the reputation for high quality which Plaintiff's food products enjoy.

XIX.

Defendant, Oriental Foods, Inc., through said patent infringement and through said acts of unfair competition has obtained substantial unlawful gains and profits and Plaintiffs, Jeno F. Paulucci and Chun King Sales, Inc., as a result of said unlawful acts of Defendant have suffered substantial loss of sales and have suffered such irreparable damage and injury to their business reputation and goodwill and have suffered substantial loss of business, for all of which there is no adequate remedy at law. Plaintiffs will continue to suffer irreparable damage until such time as Defendant is enjoined from its illegal acts. [8]

Wherefore Plaintiffs Pray:

(1) For a preliminary injunction and then a permanent injunction restraining the Defendant, its officers, agents, attorneys, employees and all in privity with it, from further manufacturing, procuring and using the apparatus disclosed and claimed in said United States Letters Patent Number 2,679,281 and from further utilizing the methods disclosed and claimed in said patent in the assembly of two or more cans into units with the cans rigidly and positively secured together in end-to-end relationship, including the pieces of apparatus now in the possession of and being presently utilized by the Defendant, and from further acts of unfair competition and trade practices as complained of herein, including the offering for sale of Oriental-type food products in package units or

assemblies consisting of two or more cans rigidly and positively secured together in end-to-end relationship as disclosed in said patent Number 2,679,281 and resembling the general arrangement, dress, style and appearance of the package units in which Plaintiff, Chun King Sales, Inc. sells its Oriental-type foods.

(2) For damages against Defendant, Oriental Foods, Inc., for its acts of unfair competition and trade practices against the Plaintiff, Chun King Sales, Inc. resulting in injury to the reputation of Plaintiff, Chun King Sales, Inc., for Oriental-type foods of high quality, excellent taste and flavor, and to its business reputation and its good-will, and for its loss of sales as a result of confusing the purchasing public into believing it was purchasing Plaintiff, Chun King Sales, Inc.'s products when it was actually buying Defendant's products, all to the amount of One Hundred Thousand Dollars ($100,000.00). [9]

(3) For an accounting of profits and damages due Plaintiff through Defendant's herein defined acts of infringement of said United States Letters Patent Number 2,679,281, and because of the wilful, wanton, and deliberate nature of Defendant's acts of infringement, for treble damages which, upon information and belief, appear well in excess of One Hundred Fifty Thousand Dollars ($150,000.00), because of Defendant's infringing acts.

(4) For full costs and interest and Plaintiff's disbursements herein.

(5) For an award of reasonable attorney's fees against the Defendant.

(6) For such other and further relief as the Court may deem just and equitable.

February 3, 1955.

[Seal] CHUN KING SALES, INC.

/s/ By JENO F. PAULUCCI,
Its President

/s/ By JENO F. PAULUCCI,

Attest: /s/ ELIZABETH PAULUS SUNIUN
Secretary,
Chun King Sales, Inc.

/s/ EVERETT J. SCHROEDER
WILLIAMSON, SCHROEDER,
ADAMS & MEYERS
Attorneys for Plaintiffs. [10]

[Note: Exhibit No. 1—Patent No. 2,679,281 is set out in the Book of Exhibits.]

[Endorsed]: Filed Feb. 16, 1955. [11]

[Title of District Court and Cause.]

ANSWER AND COUNTERCLAIM

Now comes the defendant, Oriental Foods, Inc., and in answer to the Complaint, alleges, avers, and denies as follows:

I.

Answering paragraph I of the Complaint, defendant is without knowledge or information suffi-

cient to form a belief as to the truth of the averments thereof.

II.

Answering paragraph II of the Complaint, defendant admits the averments thereof.

III.

Answering paragraph III of the Complaint, defendant admits the averments thereof. [15]

IV.

Answering paragraph IV of the Complaint, defendant admits that the alleged acts of infringement complained of in the Complant were and are being committed in Los Angeles County, California, and that the parties to this action are residents of different states, and that the controversy relating to such alleged infringement arises under the patent laws of the United States, but denies the other averments thereof.

V.

Answering paragraph V of the Complaint, the defendant is without knowledge or information sufficient to form a belief as to the truth of the averments thereof.

VI.

Answering paragraph VI of the Complaint, defendant is without knowledge or information sufficient to form a belief as to the truth of the averments thereof.

VII.

Answering paragraph VII of the Complaint, defendant is without knowledge or information sufficient to form a belief as to the truth of the averments thereof.

VIII.

Answering paragraph VIII of the Complaint, defendant admits that plaintiff Jeno F. Paulucci on May 14, 1952, filed an application, Serial No. 287,729, for United States Letters Patent through his attorney, said application later developing into United States Letters Patent No. 2,679,281, which issued to Jeno F. Paulucci on May 25, 1954, and that a soft copy of said patent is attached to the Complaint and made a part thereof as plaintiffs' "Exhibit Number 1," and defendant is without knowledge or information [16] sufficient to form a belief as to the truth of the other averments thereof.

IX.

Answering paragraph IX of the Complaint, defendant is without knowledge or information sufficient to form a belief as to the truth of the averments thereof.

X.

Answering paragraph X of the Complaint, defendant is without knowledge or information sufficient to form a belief as to the truth of the averments thereof.

XI.

Answering paragraph XI of the Complaint, defendant is without knowledge or information suffi-

cient to form a belief as to the truth of the averments thereof.

XII.

Answering paragraph XII of the Complaint, defendant is without knowledge or information sufficient to form a belief as to the truth of the averments thereof.

XIII.

Answering paragraph XIII of the Complaint, defendant denies each and every averment thereof.

XIV.

Answering paragraph XIV of the Complaint, defendant admits that it has had actual notice of the issuance of said patent No. 2,679,281 and of its alleged infringement by defendant, but denies each and every other averment thereof.

XV.

Answering paragraph XV of the Complaint, defendant is without knowledge or information sufficient to form a belief as [17] to the truth of the averments thereof.

XVI.

Answering paragraph XVI of the Complaint, the defendant denies each and every averment thereof.

XVII.

Answering paragraph XVII of the Complaint, defendant is without knowledge or information sufficient to form a belief as to the truth of the averments thereof.

XVIII.

Answering paragraph XVIII of the Complaint, defendant denies each and every averment thereof.

XIX.

Answering paragraph XIX of the Complaint, defendant denies each and every averment thereof.

Further answering the Complaint with respect to the claim or cause of action for patent infringement alleged therein and for separate, alternate, and further defenses thereto, the defendant avers as follows:

XX.

The defendant has not infringed Letters Patent No. 2,679,281, or any claim or claims thereof.

XXI.

None of the alleged inventions or discoveries claimed in Letters Patent No. 2,679,281 were patentable to the alleged inventor named therein, under the provisions of Sections 101, 102, and 103 of Title 35 of the United States Code, and therefore said patent is, and each and every claim thereof is, invalid and void. [18]

XXII.

All the claims of Letters Patent No. 2,679,281 are invalid, because the alleged inventions or discoveries described thereby were patented or described in certain printed publications and Letters Patent in this and foreign countries before the alleged inven-

tion or discovery thereof by the applicant for said Letters Patent.

XXIII.

All the claims of Letters Patent No. 2,679,281 are invalid, because prior to any supposed invention or discovery by the applicant for said Letters Patent, that which is alleged to be patented by said Letters Patent, and particularly that which is described and claimed therein, and all material and substantial parts thereof, had been known to, and used by, others in this country.

XXIV.

All the claims of Letters Patent No. 2,679,281 are invalid, because the applicant for said Letters Patent was not the original or first inventor of any material or substantial part of that which is purported to be patented in said Letters Patent, and the same thing, things and methods in all material and substantial respects had, prior to the alleged inventions or discoveries thereof by the applicant for said Letters Patent, been invented or discovered (if there be any patentable invention or discovery defined by any of said claims) by others.

XXV.

All the claims of Letters Patent No. 2,679,281 are invalid, because the alleged inventions and discoveries purportedly defined by the claims of said Letters Patent were in public use or on sale in this country for more than one (1) year prior to the [19] application date therefor by certain persons.

XXVI.

All the claims of Letters Patent No. 2,679,281 are invalid, because the alleged Letters Patent fails to comply with Section 112 of Title 35 of the United States Code and, in particular, in failing to particularly point out and distinctly claim the parts, improvements, combinations, or methods alleged to constitute the inventions or discoveries of said Letters Patent.

XXVII.

All the claims of Letters Patent No. 2,679,281 are invalid, because in view of the state of the art as it existed at the time of, and long prior to, the date of each of the alleged inventions or discoveries claimed in such Letters Patent, said Letters Patent do not claim any invention or discovery, and do not involve any invention or discovery or contain any patentable novelty, but consist of the mere adoption of well-known methods or devices for the required uses involving ordinary faculties of reasoning and the skill expected of one in the art to which said Letters Patent pertains.

XXVIII.

All the claims of Letters Patent No. 2,679,281 are invalid, because said Letters Patent were not granted or issued by the Commissioner of Patents regularly or within the authority granted him under due form of law or after due proceedings were had with respect to the application filed by or on behalf of the applicant therefor, and because the Commissioner of Patents did not cause a proper examination to be made as to the alleged inventions or dis-

coveries purportedly defined by said Letters Patent, and had such examination been made properly, it would have appeared that the applicant for said Letters Patent was not entitled thereto, [20] and said Letters Patent would not have been issued, and that said Letters Patent was irregularly granted without proper or due consideration of the application for the same and without fulfillment of the necessary requirements of the Patent Office Examiner in searching the Patent Office records available to him prerequisite to granting of said Letters Patent.

XXIX.

All the claims of Letters Patent No. 2,679,281 are invalid, because each of the claims defines merely an old combination of elements or steps in which the elements and steps operate in substantially the same way to produce substantially the same result as they did individually in the prior art.

XXX.

All the claims of Letters Patent No. 2,679,281 are invalid, because each of said claims includes more than that which was disclosed in said Letters Patent respectively, and more than that which is purported to have been invented, and because in each of said claims the language thereof is too broad at the precise alleged point of novelty.

XXXI.

All the claims of Letters Patent No. 2,679,281 are invalid, because the alleged inventions or discoveries purportedly defined by said claim, and each

of them, are not in fact inventions or discoveries but are the mere aggregation of old and unpatentable elements or the mere aggregation of old and unpatentable steps not amounting to a patentable combination or to a patentable method.

XXXII.

In view of the state of the art at and before the alleged inventions or discoveries of Letters Patent No. 2,679,281, or [21] attempted to be defined in any claim or claims of said Letters Patent, said claims, or any of them, cannot now be given an interpretation, meaning or scope to cover, include or bring within the purview thereof, any devices made by or any method practiced directly or indirectly by the defendant.

XXXIII.

While the application for Letters Patent No. 2,679,281 was pending in the Patent Office, the applicant therefor so limited and confined the disclosures and the claims of said application under the requirements of the Commissioner of Patents, or otherwise, that the plaintiff cannot now seek or obtain a construction of any of the claims of said Letters Patent sufficiently broad to cover or embrace any device made by or any method practiced directly or indirectly by the defendant.

For a counterclaim against plaintiff, defendant avers as follows:

A.

The defendant-counterclaimant is a corporation

organized and existing under the laws of the State of California and having its principal place of business in Bell Gardens, California.

B.

This counterclaim arises under Section 2201 of Title 28 of the United States Code because there is an actual controversy now existing between the counterclaimant and the counterdefendant in respect of which the counterclaimant needs a declaration of its rights by this Court, which controversy arises over the question of validity and infringement of United States Letters Patent No. 2,679,281, and each and every and all of the claims thereof, alleged to be owned by plaintiff-counterdefendant, in that plaintiff-counterdefendant has charged the defendant-counterclaimant, and [22] upon information and belief has charged customers with it, with infringement of said Letters Patent.

C.

The alleged inventions or discoveries of United States Letters Patent No. 2,679,281 are, and each and every claim thereof is, invalid and void, irrespective of any alleged infringement thereof by the defendant-counterclaimant, and the defendant-counterclaimant needs a declaratory judgment of invalidity and unenforcibility of said Letters Patent, and each and every and all of the claims thereof, on the grounds set forth herein as a means of relief to it and the public at large.

D.

The defendant-counterclaimant adopts, repeats and realleges as paragraphs E to R, inclusive, of this counterclaim, each and every one of the allegations contained in paragraphs XX to XXXIII, inclusive, of the foregoing answer with like effect as if fully repeated herein.

Wherefore, the defendant and counterclaimant prays as follows:

1. That the Complaint be dismissed with prejudice;

2. That United States Letters Patent No. 2,679,281, and each and every of the claims thereof, be declared not infringed by any act of defendant and counterclaimant;

3. That United States Letters Patent No. 2,679,281, and each and every of the claims thereof, be declared and adjudged invalid, void and unenforcible;

4. That the defendant and counterclaimant recover from plaintiff and counterdefendant its costs and disbursements herein and reasonable attorneys' fees; and [23]

5. That the defendant and counterclaimant be granted such other and further relief as may be proper.

Dated: At Los Angeles, California, this 14th day of April, 1955.

HARRIS, KIECH, FOSTER
& HARRIS
FORD HARRIS, JR.
WARREN L. KERN
WALTON EUGENE TINSLEY

/s/ By FORD HARRIS, JR.,

Attorneys for Defendant and Counterclaimant. [24]

Affidavit of Service by Mail attached. [25]

[Endorsed]: Filed April 14, 1955.

[Title of District Court and Cause.]

ANSWER TO COUNTERCLAIM

Come now plaintiffs and in answer to the counterclaim of the defendant, allege, aver and deny as follows:

1.

Answering paragraph C of the said answer and counterclaim, plaintiffs deny each and every of the allegations therein set forth.

2.

Answering paragraph D of the said answer and counterclaim, plaintiffs are without knowledge suf-

ficient to enable them to answer paragraphs XXI, XXII, XXIII, XXIV, XXV, XXVI, XXVII, XXVIII, XXIX, XXX, XXXI and XXXII of the said answer as no fact or information is pleaded or alleged in said [36] answer to formulate any basis for the legal conclusion attempted to be set forth in said paragraphs and these plaintiffs deny emphatically the legal conclusions expressed in the said paragraphs as well as the assertion of invalidity of the Letters Patent in suit as set forth in paragraph XX.

Wherefore, plaintiffs pray that the counterclaim be dismissed with prejudice and that the plaintiffs recover from the defendant and counterclaimant their costs and disbursements occasioned by the counterclaim, together with reasonable attorney's fees.

Dated: May 3, 1955.

WILLIAMSON, SCHROEDER,
ADAMS & MEYERS

/s/ By EVERETT J. SCHROEDER

LYON & LYON

/s/ By LEWIS E. LYON,

Attorneys for Plaintiffs [37]

Acknowledgment of Service Attached. [38]

[Endorsed]: Filed May 3, 1955.

[Title of District Court and Cause.]

DEFENDANT'S FURTHER ANSWERS TO PLAINTIFFS' INTERROGATORIES

Defendant, by its Vice-President, Jaisohn Hyun, answers certain of plaintiffs' interrogatories as follows:

Interrogatory 1. "What is the name or title of, and the publication or issuance date of, or other identification means of, the 'certain printed publications and Letters Patent' referred to in Paragraph XXII of Defendant's Answer in the above entitled action?"

Answer: As at present advised, the following United States Letters Patent:

Nifong, No. 2,120,504.....issued June 14, 1938
Johnson, No. 2,652,166....issued Sept. 15, 1953
Ruttan, No. 1,672,839.....issued June 6, 1928
Roehrl, No. 2,484,248.....issued Oct. 11, 1949
Ewart, No. 2,590,241....issued March 25, 1952
Swartz, No. 2,502,635.....issued April 4, 1950
Loskamp, No. 921,855.....issued May 18, 1909
Nicholls, No. 1,939,719.....issued Dec. 19, 1933
Glidden, No. 2,006,451.....issued July 2, 1935
Blum, No. 2,087,227.....issued April 27, 1937
Howard, No. 2,307,406.....issued Jan. 5, 1943
Thomson, No. 2,326,414....issued Aug. 10, 1943
Kellgren, No. 2,444,830.....issued July 6, 1948
Bergstein, No. 2,587,685..issued March 4, 1952

Interrogatory 2: "What is the name and address of the person or persons who have knowledge or

possession of the 'certain printed publications and Letters Patent' referred to in Paragraph XXII of Defendant's Answer in the above entitled action?"

Answer: Defendant's Counsel.

Interrogatory 6: "What is the name or names and addresses of the person or persons referred to as 'others' in Paragraph XXIV of Defendant's Answer in the above entitled action?"

Answer: The patentees of the patents listed above in answer to Interrogatory 1.

Interrogatory 13: "Please identify specifically, all of the prior art referred to in Paragraph XXVII of Defendant's Answer in the above entitled action."

Answer: The patents referred to above in answer to Interrogatory 1 and the prior public knowledge and use referred to in answers to Interrogatories 4 and 34. [75]

Interrogatory 14: "Please identify specifically, any and all prior patents, publications, disclosures and other prior art, other than that identified in response to Interrogatory No. 13 above, upon which Defendant intends to rely in the defense of the above entitled action."

Answer: The prior use by plaintiff, identified in defendant's answer to Interrogatory 4; and the prior use by defendant, identified in its answer to Interrogatory 34.

Interrogatory 18: "Please identify specifically and with particularity the prior art as referred to in Paragraph XXIX of Defendant's Answer in the above entitled action."

Answer: The patents and prior uses identified in defendant's answers to Interrogatories 1, 4, 13, 14, and 34.

Interrogatory 19: "Please point out specifically and with particularity the manner in which the prior art discloses the combination of elements or steps in which the elements and steps operate in substantially the same way to produce substantially the same results, as that defined in United States Letters Patent Number 2,679,281, as averred in Paragraph XXIX of Defendant's Answer in the above entitled action."

Answer: Upon information and belief:

The Johnson patent No. 2,652,166 discloses a machine for, and method of, applying a sticky resilient tape to a can, in which the can is rotated on its own axis to apply the tape to [76] the can, the tape then being cut by a cutter disposed adjacent the can.

The Ruttan patent No. 1,672,839 discloses a method of securing two cans together in end-to-end relationship by a tape.

The Roehrl patent No. 2,484,248 discloses a method of securing two cylindrical objects together in end-to-end relationship by a tape.

The Ewart patent No. 2,590,241 discloses a machine for securing cylindrical objects together in end-to-end relationship, including a V-shaped trough for holding the objects during the operation.

The Swartz patent No. 2,502,635 discloses a method of securing together two loaves of bread in end-to-end relationship by means of a tape.

Interrogatory 23: "Please identify respectively,

and with particularity, any and all prior art which shows that each of the elements of the Claims of United States Letters Patent Number 2,679,281 is old and unpatentable as averred in Paragraph XXXI of Defendant's Answer in the above entitled action."

Answer: The patents and prior art identified in defendant's answers to Interrogatories 1, 4, 13, 14, and 34.

Interrogatory 24: "Please identify respectively, and with particularity, any and all prior art which shows that each of the steps of the Claims of United States Letters Patent Number 2,679,281 is old and unpatentable as averred in Paragraph XXXI of Defendant's Answer in the above entitled action."

Answer: The patents and prior art identified in defendant's answers to Interrogatories 1, 4, 13, 14, and 34.

Interrogatory 25: "Please describe with particularity the structure of the devices made and used by the Defendant as referred to in Paragraph XXXII of Defendant's Answer in the above entitled action."

Answer: The Dellenbarger machine currently used by defendant to tape together two or more cans of food is identified in answer to Interrogatory 39. This machine has a steel base plate, approximately 28" x 14½" standing on four legs on the floor. Rigidly mounted on the base plate and extending upwardly therefrom are two supporting members, between which are a pair of parallel rollers adapted to support two or more cans of food in

end-to-end alignment. Extending from each of the supporting members is a rotatable collor in axial alignment with the cans supported by the rollers, one of the collars being movable inwardly to hold the cans in end-to-end engagement. The tape applying mechanism is generally as shown and described in the United States Letters Patent No, 2,652,166 issued to A. E. Johnson, particularly as shown in Figs. 4, 5, and 6 thereof, being supported on the supporting members described above. Such tape applying mechanism has a corrugated roller to pull the tape from a pivoted dispensing roll of tape, and an applying roller to apply the tape over the joint made by the beads of the cans during rotation of the cans. It has a buffing roller adapted to press the tape down over the beads and onto the cans and to smooth it out thereon. Between the applying roller and the buffing roller is a knife which, upon upward retracting movement of the corrugated and applying rollers, [78] cuts the tape off to the desired length, following which the buffing roller applies and smoothes down the loose end of the tape. An automatic ejector then ejects the cans taped together into a hopper through which the combination package rolls to a packing station. In the operation of this machine, upon information and belief, no portion of the tape is stretched at any time before or during its application to the cans, and at no time is any portion of the tape pulled in a direction substantially tangential to the periphery of the cans. Such machine has no V-shaped trough for receiving the separate cans in end-to-end relationship,

and at no time does the knife or cutter either guide or support the tape.

Interrogatory 26: "Please describe with particularity the method or methods used by Defendant as referred to in Paragraph XXXII of Defendant's Answer in the above entitled action."

Answer: (a) Commencing on or about June 10, 1949, defendant secured together with sticky tape two or more cans of food for commercial sale by the following method: the cans were aligned in end-to-end relationship with adjacent end beads of said cans abutting each other; the end of a sticky tape was applied over portions of the abutting beads and side walls of the cans as as to stick to both cans and then the tape was wound around the cans over the joint between them so as to completely encircle the two cans at the joint while manually holding the tape under tension; then the tape was cut off and the loose end was pressed down to adhere to the tape encircling the cans or to the cans themselves.

(b) Since about May, 1954, defendant has secured together with sticky tape two or more cans of food for commercial sale by the Dellenbarger machine identified in answer to Interrogatory [79] 39. Upon information and belief, in using such machine, the operation of which is largely automatic: sticky tape is employed, but such tape is not resilient nor is it appreciably stretched during its application to the cans; after a loose end of the tape is applied to the cans by the machine, the portion of the tape not secured to the cans is not pulled in any way, the cans

merely being rotated to encircle the cans with the tape, and the tape is not in a stretched condition while being applied or otherwise.

Interrogatory 27: "In what specific respects does the prior art relative to United States Letters Patent Number 2,679,281 prevent the Claims of said patent from being given an interpretation, meaning, or scope to cover, include, or bring within the purview thereof, any devices made by or any method practiced directly or indirectly by the Defendant, as averred in Paragraph 32 of Defendant's Answer in the above entitled action."

Answer: Upon information and belief, if the claims of Letters Patent No. 2,679,281 are construed broadly enough to cover any of the devices or methods used by the defendant, such claims are invalid in view of the prior art.

Interrogatory 28: "Please identify with particularity, the art referred to in Paragraph XXXII of Defendant's Answer in the above entitled action."

Answer: The prior art identified in answers to Interrogatories 1, 4, 13, 14, and 34.

/s/ JAISOHN HYUN

Duly Verified. [81]

Acknowledgment of Service Attached. [82]

[Endorsed]: Filed Oct. 19, 1955.

[Title of District Court and Cause.]

DEFENDANT'S REQUEST FOR ADMISSIONS

Pursuant to Rule 36 of the Rules of Civil Procedure, each of the plaintiffs in the above-entitled action is hereby requested to admit, within ten (10) days after service hereof, the truth of the following matters of fact:

1.

An action entitled Chun King Sales, Inc. and Jeno F. Paulucci v. Hung K. Tom and Ann Wong Tom, co-partners, doing business as Min Sun Trading Company and Min Sun Trading Co., a corporation, No. 55 C 678, on August 4, 1955, was pending in the United States District Court, Northern District of Illinois, Eastern Division, involving issues of the validity of United States Letters Patent No. 2,679,281.

2.

The plaintiff Jeno F. Paulucci in said action No. 55 C 678 is the same person as Jeno F. Paulucci plaintiff in this action. [83]

3.

On August 4, 1955, said Jeno F. Paulucci appeared as a witness in said action No. 55 C 678 and testified under oath by deposition, and the following are true and correct portions of the transcript of said deposition:

In The United States District Court Northern District of Illinois, Eastern Division

Civil Action No. 55 C 678

CHUN KING SALES, INC., and JENO F. PAULUCCI, Plaintiffs,

vs.

HUNG K. TOM and ANN WONG TOM, co-partners, doing business as MIN SUN TRADING COMPANY and MIN SUN TRADING CO., a corporation, Defendants.

The deposition of Jeno F. Paulucci, called by the defendants for examination, pursuant to notice, and pursuant to the Rules of Civil Procedure for the United States District Courts pertaining to the taking of depositions for the purpose of discovery, taken before Teresa A. Lucey, a notary public within and for the County of Cook and State of Illinois, at Suite 1041, 209 South LaSalle Street, Chicago, Illinois, on Thursday, August 4, 1955.

Present: Mr. Everett J. Schroeder, appeared on behalf of the Plaintiffs; Mr. John W. Hofeldt, and Mr. William J. Marshall, Jr., appeared on behalf of the defendants. [84]

Mr. Hofeldt: This deposition is being taken pursuant to the Federal Rules of Civil Procedure and is taken pursuant to notice. The notice lists the time for July 21, 1955, and subsequently upon approval of the Court postponed to August 4, today.

I hand the notary public the original of the

notice for the taking of the deposition to be attached to the original of the deposition.

JENO F. PAULUCCI

having been first duly sworn, desposeth and saith as follows:

Direct Examination

Q. (By Mr. Hofeldt): Will you state your full name, please?

A. Jeno, J-e-n-o, F. Paulucci, "P" as in Peter, a-u-l-u-c-c-i.

Q. Where do you live, Mr. Paulucci?

A. Duluth, Minnesota.

Q. Will you give your complete address?

A. 6 Minneapolis Avenue.

Q. What is your business, Mr. Paulucci?

A. Food processor.

Q. Are you the plaintiff in this action?

A. I am.

Q. What is your relationship to Chun King Sales, Inc.? A. I own it.

Q. Are you an officer of that corporation?

A. Yes.

Q. How long has that corporation been in existence? A. Since May of 1947.

Q. Chun King Sales, Inc., that corporation is the other plaintiff in this action, is it not?

A. Yes. [85] * * * * *

Q. (By Mr. Hofeldt): When did you first start canning and selling an oriental-type dish in which any part was separate from any other part thereof in two or more separate cans?

(Deposition of Jeno F. Paulucci.)

A. Back in 1947.

Q. Were those cans joined together in any way for sale?

A. Would you explain what you mean by the word "joined"?

Q. What do you understand by the word "joined"?

A. It could be many ways: two cans in a package.

Q. I mean any way; joined in any way.

A. I said 1947.

Q. How were they joined?

A. In a package, in a box, one can alongside of the other.

Q. It had a wrapper of some kind or a cardboard box around the two cans, is that it?

A. They were put into a carton, that is right.

Q. Did you join them in any other way subsequent to 1947? A. You mean after 1947?

Q. That is right. A. Yes.

Q. In what way?

A. By putting one can on top of the other and putting tape around it.

Q. Did you ever solder the cans in an end-to-end relationship? A. No, sir.

Q. Never have done that?

A. No, sir; not end-to-end, no, sir.

Q. You mention taping the cans together. How was that accomplished?

A. By putting the tape around the beads of the cans. [86]

(Deposition of Jeno F. Paulucci.)

Q. What kind of tape?

A. I guess you refer to it as cello-tape.

Q. Is that a trade name or something?

A. I believe that is a trade name, yes.

Q. What kind of tape is that tape?

A. It is a sticky tape.

Q. What type of backing does it have?

A. Cellophane.

Q. Cellophane?

A. I'm not qualified to say, but I take it that it is.

Q. Are you using the same type of tape now?

A. Same type, yes.

Mr. Schroeder: As when?

Q. (By Mr. Hofeldt): As 1947?

A. Yes. No, I never told you we used tape in 1947.

Q. I am sorry. What year did you first use the tape to tape together two cans in an end-to-end relationship? A. 1949.

Q. Is the tape that you are presently using the same tape that you were using at that time?

A. No.

Q. What type of tape are you using now?

A. Approximately the same type of tape.

Q. How does that differ, the one now, from the one in 1949?

A. You asked me before if we use the same type. We couldn't use the same tape.

Q. I realize that. We can exclude that.

A. Yes.

(Deposition of Jeno F. Paulucci.)

Q. But it is the same type of tape?

A. Approximately, yes. Different suppliers, so I don't know their system of manufacture. [87]

Mr. Schroeder: Isn't it a difference in quality, too?

The Witness: Yes, there is a difference in quality. We are all talking about that.

Q. (By Mr. Hofeldt): Where did you first——

A. By "type," I meant the cello backing.

He asked about with the sticky surface.

I mentioned before that I don't know whether it has cello backing. I take it it has cello backing because it is called that. How it is made, whether what we are using today is the same type or not, I don't know. We call it in our own terminology the same thing, but that is as far as it goes.

Q. Was it a transparent tape that you bought in 1949?

A. I couldn't say it was transparent, either.

Q. You don't remember whether it was transparent or not?

A. Transparent, you can see through, can you not?

Q. Yes.

A. I doubt whether this—whether you could see through this clearly.

Q. But you could see through it?

A. Are you asking me or telling me?

Q. I am asking you. A. I don't know.

Mr. Schroeder: He wants to find out, that is all.

(Deposition of Jeno F. Paulucci.)

The Witness: I am not going to be confused into being told.

Q. (By Mr. Hofeldt): In 1949 from whom were you buying your tape?

A. At that time I believe most of it was being bought from Minnesoto Mining and Manufacturing Company. [88]

* * * * *

Q. If you know, what did Minnesota Mining call this tape it was supplying to you in 1949?

A. I don't know. All I know we have always referred to it as cello-tape, no matter whom we bought it from. No matter what year it was, whether it was today or 1949.

Q. Was this tape you purchased in 1949 stretchy at all, do you recall? A. I don't recall.

* * * * *

Q. (By Mr. Hofeldt): In 1949, in the application of this tape to the cans for the purpose of securing them in an end-to-end relationship, did you or your organization have to add to the adhesive on the tape anything to make it adhere to the surface of the cans?

A. I don't just choose to answer that question in that manner, because it has taken certain assumptions there.

My answer would have to be no. I cannot answer it in the light you have presented it.

Q. In what respects isn't it clear?

A. You have taken certain assumptions.

Q. Will you name those, please?

(Deposition of Jeno F. Paulucci.)

A. That they would adhere.

Q. That is exactly the question that I am asking you. Did they adhere?

Mr. Schroeder: What he wants to know is when they secure cans together, did they add something to the tape first?

The Witness: If he asked me that way.

Q. (By Mr. Hofeldt): Will you answer the question of your counsel then?

A. When we used the tape in 1949 we did not add anything. [89]

Q. Who first had the idea of joining cans in an end-to-end relationship by the use of tape?

A. I did.

Q. When about did you get that idea?

A. Around April, I believe, 1949.

Q. Did you join any cans together in an end-to-end relationship by using tape in 1949? You personally, now. A. Yes.

Q. What means did you use, or how did you accomplish this?

A. I took a piece of tape and rolled two cans in an end-to-end relationship into the tape.

Q. Did you lay the tape flat on a surface, is that it? A. Sometimes.

Q. How did you do it other times?

A. By having the tape suspended from the dispenser.

Q. Did you rotate the cans together into this tape? A. I rolled them into the tape.

(Deposition of Jeno F. Paulucci.)

Mr. Schroeder: By that do you mean you rolled them along the surface of the table?

The Witness: I just rolled them into the tape.

Mr. Schroeder: Did the cans move or set in one place?

The Witness: The cans moved. He said rotated. Rotated means in one position. Rolled means roll right in.

Mr. Schroeder: They moved across the surface of the table?

The Witness: They rolled across the surface of the table to the tape.

Q. (By Mr. Hofeldt): When you were using the tape on the dispenser, how then did you roll these cans into the tape? [90]

A. By having the tape pulled out from the dispenser, taking the cans, and rolling them either on a flat table surface or just rolling them up into the tape, up to the end of the cutting bar or the dispenser, and then cutting the tape.

Q. Did you cut this tape before you rolled from the dispenser before you rolled the cans into this length of tape? A. Sometimes.

Q. How did you do it other times?

A. Just mentioned it. By rolling the cans up to the dispenser and then cutting the tape.

Q. What I am trying to get at is, did you have a length of tape away from the dispenser or the cutting bar of the dispenser before you rolled the cans into this tape? A. Yes, sir.

Q. Did you ever try to roll the cans and have the

(Deposition of Jeno F. Paulucci.)

rotation of the cans pull the tape off of the roll on the dispenser? A. We did after August of 1951.

Q. You never tried that before? A. No, sir.

Mr. Schroeder: You mean commercially?

The Witness: Yes.

You are talking about as President of Chun King Sales and owner of Chun King Sales, are you not?

Q. (By Mr. Hofeldt): Well, let us take it that way, first. All right.

Q. When you were rolling these cans, did you hold on to the end that you had just cut off of the dispenser, the end of the tape? A. No.

Q. You never held on? [91]

A. I would not say never. You are asking me as customary procedure?

Q. That is right. A. The answer is no.

Q. You never did that?

A. You are asking me whether it is customary. "Never" would mean once or twice or a few times. You are asking me as a customary practice.

Q. As a customary practice. A. No.

Q. You did not hold on to the other end. Now, as other than a customary practice, did you ever hold on to the tape?

A. In experiments, yes.

Mr. Schroeder: Which end are you talking about?

Mr. Hofeldt: The end you cut from the dispenser roll. There are two ends.

Mr. Schroeder: The free end he attaches to the

(Deposition of Jeno F. Paulucci.)

can. You are talking about the other end after he pulled it out.

The Witness: I was talking about the first end.

Mr. Schroeder: The end you tape it on?

The Witness: Yes.

Mr. Schroeder: You are talking about two different things.

Mr. Hofeldt: Let us clarify this a bit.

Q. (By Mr. Hofeldt): You have a free end. Am I correct in assuming you pull the length of tape off of the roll? A. No. [92]

Mr. Schroeder: He means are you pulling it out?

The Witness: When you read these things they are darn technical. He phrases his questions very completely and I have got to answer them in that manner.

Q. (By Mr. Hofeldt): Did you unwind from the roll of the tape a length of tape? A. Yes.

Q. Then what did you do?

A. Tapped, pressed the loose end onto the bead of the two cans, and then rolled the cans forward up to the dispenser, and then cut the other end and tapped that on top of the other tape.

Q. In the rolling of the cans in the manner you have specified, was the tape held taut against the dispenser in the rolling operation? A. No.

Q. You have never done that, or you did not do that at that time? A. That is correct.

Mr. Schroeder: At what time?

Mr. Hofeldt: 1949.

Q. (By Mr. Hofeldt): Did your organization

(Deposition of Jeno F. Paulucci.)

sell any cans of oriental food so taped together in the manner you just specified in 1949? A. Yes.

Q. Did you sell all that you had joined in that way? A. Not all.

Q. Did you sell the majority that you had taped together in that way? A. I would say so.

Q. About how many sales did you make? [93]

A. I do not know.

Q. Would the records of your company show?

A. We did not keep an analysis of product sales.

* * * * *

Q. How long did you continue to merchandise your products where the cans were joined together in an end-to-end relationship by the application of tape as you have indicated?

A. Right up to the present time we are merchandising two cans in an end-to-end relationship.

Q. You are still employing the means that you specified of rolling the cans into a piece of tape?

A. Positively not.

Q. How long did you continue to merchandise a product so joined?

A. So joined? Would you tell me?

Q. In that manner. A. Which manner?

Q. In the manner you were selling them starting in 1949; the manner you were joining them starting in 1949.

A. The same manner as we were doing in 1949 we did until approximately August of 1951.

Q. August of 1951. Did you use any machinery

(Deposition of Jeno F. Paulucci.)

in this operation? I am using the term "machinery" very broadly.

A. Explain to me how you mean "broadly"?

Mr. Schroeder: You are in 1949?

Mr. Hofeldt: 1949.

The Witness: Will you explain——

Q. (By Mr. Hofeldt): Any kind of mechanical appliance for applying tape. A. No.

Q. You were using none? A. No, sir. [94]

Q. Other than the dispenser now?

A. That is right.

Mr. Schroeder: You were using a table?

The Witness: He said mechanical. By "mechanical" you mean something with a motor, correct?

Mr. Hofeldt: Not necessarily.

Mr. Schroeder: Tell him what you were using.

Q. (By Mr. Hofeldt): What type of device or devices were you using in the employment of this means or method in 1949?

A. You mean in 1941 up to——

Q. 1951.

Mr. Schroeder: You did not mean 1941, did you?

Q. (By Mr. Hofeldt): 1949.

A. The tape dispenser with an angle iron holding it that we put the cans in to start the tape.

Q. What was the configuration of this angle iron that you are talking about?

A. I am sorry, you will have to explain what you mean by that word "configuration" or whatever it is.

(Deposition of Jeno F. Paulucci.)

Q. What shape did the angle iron have?

A. An angle iron is, what is it, a 90 degree angle or something?

Mr. Schroeder: I think it is.

Mr. Marshall: I always thought——

Mr. Hofeldt: It could be up to 360 when you get a flat one.

Q. (By Mr. Hofeldt): Was this a 90 degree angle iron? A. I wouldn't swear it was. [95]

Q. Was it V-shaped?

A. I couldn't tell you. All I know it was an angle iron.

Q. It was used to hold the cans?

A. To rest the cans in.

Mr. Schroeder: Is that throughout the operation?

The Witness: No, we used many different other things.

Mr. Schroeder: I mean throughout your operation in 1949. You said it was used to hold the cans.

The Witness: I said to rest the cans in so we could take a loose end of the tape and touch it on the beads of the two cans and then take the cans in our hands and roll them up to the dispenser.

Q. (By Mr. Hofeldt): Now, this free end of the tape, where was it applied in relation to the can or the two cans to be joined?

A. On the two beads.

Q. On the top or bottom of the can as they rested?

Mr. Marshall: On the angle iron.

(Deposition of Jeno F. Paulucci.)

A. (By the Witness): You are simmering it down to two points, top or bottom. All I can say it was not bottom, because it was resting on the angle iron.

Q. (By Mr. Hofeldt): In what direction were you rolling the cans?

A. It would be exactly——

He is asking me on the top or the bottom. It could be on the sides. [96]

Q. As the cans were resting on the angle iron, was the free end of the tape applied to the top periphery of the cans?

A. Sometimes, and sometimes to the bottom, depending on actually the operator.

Q. In what direction did you roll the cans?

A. Forward to the dispenser.

Q. Was the sticky side of the tape up or down?

A. The sticky side of the tape was down against the cans.

Q. And the remaining portion of the tape to the dispenser, was that up or down, the sticky side now?

A. The sticky side was always down, facing the table. It could not be up because your tape in the roll has adhesion. That is what makes it roll.

Mr. Schroeder: I am confused now.

Mr. Hofeldt: I am a little confused on this. I think we better have a demonstration of just how this was done.

Mr. Schroeder: It may be a good idea.

Q. (By Mr. Hofeldt): We have before you, Mr. Paulucci, an ordinary piece of plywood which would

(Deposition of Jeno F. Paulucci.)

measure approximately 30 by 24, 30 inches in length and 24 inches in width. We have on there what could roughly be described as a V-shaped trough. We have a dispenser on here that has the trade-mark "Scotch Brand Cellulose Tape" on it, and in the dispenser on a core is a roll of cellophane tape.

Is that like the tape you were using at that time?

Mr. Hofeldt: Let the record show the witness is examining the portion of the tape.

A. (By the Witness): No.

Q. (By Mr. Hofeldt): How did it differ? [97]

A. We used a color tape.

Q. What color? A. Red, green.

Q. Are there any other characteristics, Mr. Paulucci, about this tape that is not the same as the tape you were using then, other than color?

A. You are speaking then in 1949?

Q. In this roll and the type of tape you were using in 1949?

A. I would say that that is—I can't actually tell you for the simple reason the Minnesota Mining had quite a bit of trouble with tape where it would break on us. I don't know whether they made any changes in their tape.

Q. In 1949 it would break? A. Yes.

Q. Due to what reason?

A. It would break on the roll here (indicating). If it was too humid or too hot, it would break off the roll. Our girls would have to dig down with

(Deposition of Jeno F. Paulucci.)

their thumbnail to loosen the tape from the master roll again.

Q. Disregarding that possible difference——

A. It was not a possible difference. It was a difference.

Q. We don't know if this tape would do the same thing or not. I ask you to disregard that difference.

Was there any other difference that you know of?

A. The tape we were using as I mentioned before was colored.

Q. Any other difference?

A. I can't tell. I really can't tell what we were using then and what you are showing me here now. I would not ever say that I am judge enough to say it is the same tape or not the same tape.

Q. You were pulling this tape. For what purpose?

A. We were pulling them in order to get it off of the master roll. [98]

Mr. Schroeder: I did it because I was under the impression that they were using a tape quite similar to what they are using now. I know what they are using now are slightly stretchy—a slightly stretchy tape. Maybe "Scotch" tape is, too.

The Witness: Our biggest problem in 1949 was it would break on the master roll.

Q. (By Mr. Hofeldt): Was that stretchy tape you were using in 1949?

A. No, it was their conventional tape.

Q. It was not stretchy at all?

(Deposition of Jeno F. Paulucci.)

A. I can't say whether it was or not. We did not try to stretch it, so I wouldn't know.

Q. Do you happen to know whether the tape supplied to you by Minnesota Mining was No. 600 tape? A. I would not know.

Q. You would not know that?

A. I would not know positively, no.

Q. Would your records indicate?

A. Those invoices that you are going to get per your suggestion might indicate it, I don't know.

Q. Is this the type of dispenser you were using in 1949?

A. By "dispenser," what do you mean?

Q. The standard in which the tape is now on a core.

A. I would say it was similar to that, yes.

Q. Was it bigger or smaller?

A. I couldn't tell you; that is quite a few years ago.

Q. It is approximately?

A. To my memory it looks approximately the same.

Mr. Hofeldt: I will ask the reporter to mark a roll of red sticky tape on a core, [99] bearing among other things the terms "Scotch Brand Pressure Sensitive Tape" and the No. 2CRB 12F 5 C 3B5, as Paulucci deposition Exhibit No. 1.

I ask the dispenser to be marked as Paulucci deposition Exhibit No. 2.

I want to have the board with the V-shaped trough marked for identification as Paulucci deposi-

(Deposition of Jeno F. Paulucci.)

tion Exhibit No. 3. It measures 27½ by 19¾ inches.

The two cans we will mark Paulucci deposition Exhibits 4-A and 4-B.

(Articles so marked.)

Q. (By Mr. Hofeldt): You are pulling a length of tape from the roll——

A. No. 1, I want to say that this is difficult for me to do simply because we had no big, what did you call this, V-type trough as you have on here, so I will do the best I can with what you have here.

Mr. Schroeder: First of all, here the position——

The Witness: Position, there again that is relative again.

Mr. Schroeder: The diameter of the can I want the record to show as to where this has to be.

Mr. Marshall: You mean the dispenser?

Mr. Schroeder: I want to know the length of the tape. I want the record to show how far this is from the trough. [100]

Mr. Marshall: Let us refer to it as Exhibit 2.

Mr. Schroeder: Is that the length you need?

The Witness: I don't know, because with this here it is difficult for me to tell.

Mr. Schroeder: Is that proper, or do you think you need more length.

The Witness: What I am going by is how it will be for me to do this now based on this deal they have.

Mr. Schroeder: Are you in the proper position to do it?

(Deposition of Jeno F. Paulucci.)

The Witness: It has to be parallel to the cans.

Mr. Schroeder: I mean with regard to the distance away from the cans

The Witness: I can't tell because of the V they have here (indicating).

Mr. Marshall: From the center of the cans where you have them in this trough to the cutting edge is roughly 14 inches.

Q. (By Mr. Hofeldt): You are pulling a length of tape from the roll, Paulucci Exhibit No. 1.

A. You see, we have also guides along here (indicating).

Q. Along on each side of the outer edge of each can.

A. You see, I used too much tape there. That is just how it was done.

I can't say that is just how it was done. I am giving you an idea how it is done. [101]

No. 1, we don't have the guides we had at that time. The cans were rolled in. Here you have given me something without guides. You have given me something that is——

Mr. Marshall: Mr. Paulucci, you are rolling counterclockwise away from you, aren't you?

The Witness: That is right.

Mr. Schroeder: It depends on which end you are looking.

Mr. Marshall: He is rolling the can away from the dispenser, but he is moving it toward the dispenser. He is rotating it away from—the top por-

(Deposition of Jeno F. Paulucci.)

tion of it is rotated away from the dispenser while both cans progress towards the dispenser.

The Witness: We had some girls that did this.

Q. (By Mr. Hofeldt): Like "this" you mean that they took a piece of tape from the dispenser, held two cans together, in end-to-end relationship, put one down and held the other end of the tape and just rotated the tape to the bead of the cans?

Mr. Schroeder: Rolled the cans into the tape, the tape being completely separated from the dispenser.

Q. (By Mr. Hofeldt): I notice on this can where the bead joins together that the tape is on what do you call that? A. Bead.

Q. On the beads? A. That is right. [102]

Q. Did you do anything about affixing the outer edges of the tape to the cans themselves or to the labels?

Mr. Marshall: The walls of the can.

A. (By the Witness): No more than this as you see here, except sometimes if it was really stuck out a girl would maybe rub her finger on it, because it was sticking out.

Mr. Schroeder: Press down?

The Witness: She would go like this if it was kind of wrinkly, and then they would come apart easy.

Q. (By Mr. Hofeldt): With the application of some force?

A. Because I did it, I think, slowly and method-

(Deposition of Jeno F. Paulucci.)

ically here. We had our girls doing it and they did it in a hurry. We had these coming apart.

Q. Did you press down edges of the tape on to the walls of the cans adjacent to the beads as a regular procedure? A. No, sir.

Q. That did not occur to you at that time?

A. No, sir.

Q. You sold products in cans with the cans so joined as you have just demonstrated, did you?

Q. When?

Q. In 1949? A. Yes.

* * * * *

Mr. Schroeder: May I ask a question?

Is this method that you just demonstrated the taping, the one you were referring to previously when you said many of them came apart and you sold what was good. I think you testified to that before. [103]

The Witness: I said we sold the majority of them, yes.

Q. (By Mr. Hofeldt): What did you do with the ones you did not sell? A. Retape them.

Q. You would retape them. So, all of them were eventually sold, were they not? A. Not all.

Mr. Schroeder: He means all the cans.

The Witness: My answer is not all.

Q. (By Mr. Hofeldt): How did you retape them? In the same manner?

A. In the same manner.

Q. They were successful the second time?

A. Let us say we sold them the second time.

(Deposition of Jeno F. Paulucci.)

Q. They were sold?

A. There were certain cans, of course, that got dented, and things like that.

Q. When did they come apart?

A. At all different intervals from the time they were first taped up until the time they got to grocers' shelves, and I would say possibly up to the time of the homemaker's home.

Q. What did the grocer do with the cans that came apart, if you know?

A. Well, he wouldn't do much. It would be usually our broker or our salesman in seeing any of it on the shelves would retape them together just by taking some tape and attaching it together so they would stay.

Q. Did they attach that tape to the beads of the can?

A. Well, I wouldn't know. They would attach them so they would stay. It might have just been patched up where the tape broke or tore or the cans came loose. [104]

Q. Was the tape in its long direction around the periphery of the can when this was done?

A. I couldn't say that. That would be up to the salesman himself. He was trying to keep them so they would be saleable.

Q. What width of tape were you using at that time in 1949?

A. I believe it was around a half inch. I am not positive, but I believe it was around a half inch.

Q. Did you ever use any larger than that that

(Deposition of Jeno F. Paulucci.)

you recall? A. We could have.

Q. That is to say, these invoices you are going to produce of your tape purchases in the years 1949 through 1953, will show that?

A. I am sure it will show that, yes.

Q. Did you use tape for any other purpose in your organization other than taping ends together?

A. Well, I imagine we did, but it would be in a minor degree.

Q. How minor? A. Well, quite minor.

Q. The vast majority of the tape would be for taping the cans together?

A. Oh, yes, certainly.

Q. Do you know at that time whether that tape was stretchy that you were using in 1949?

A. I don't know. We had no occasion really to want to know or to find out, so I couldn't know.

Q. Through 1949, from about April, I believe you said, through August of 1951, you used this method that you have previously described to us and demonstrated to us in all your operations?

A. Would you explain what you mean by "all operations"?

Q. Of joining two cans together and selling them. A. Basically, yes.

Q. You say basically. There were some differences then? [105]

A. A lot of times according to the girls themselves, some of them had different ways they did themselves they would like to do.

* * * * *

(Deposition of Jeno F. Paulucci.)

Q. (By Mr. Hofeldt): Incidentally, in your plant when the girls were taping these cans as you have previously described them and demonstrated, was the plant open to anybody who came in?

A. Practically, yes.

Q. Anybody could have walked in there and seen what was going on?

A. No, I wouldn't say anyone, no.

Q. But, there was no restriction of secrecy or privacy or anything like that? There was no custom to keep anybody out?

A. That is correct, except we did not want competitors coming in, but your representatives like Minnesota Mining and Manufacturing people were invited to come in at any time.

Q. What representatives of Minnesota Mining were coming in at that time in 1949?

A. I believe you had Mr. Eugene or Gene Hammond at that time; later on I believe a Mr. Cronnin.

Q. They witnessed these operations?

A. Well, I am quite sure they did.

Q. Was their attention called to what you were using this tape for? A. Positively.

Q. Did they make any suggestions as to means of fastening this tape to the cans?

A. Any suggestions—the only suggestions I believe they did make that I remember is using a half inch rather than wider tape. I believe we were using approxicately five-eighths of an inch when we started, and I believe they suggested possibly using a half inch. [106]

(Deposition of Jeno F. Paulucci.)

Q. Do you recall why? What reason they had for your using a half instead of five-eighths?

A. Economy; it was cheaper.

Q. Simply economy?

A. I would say so, yes.

* * * * *

Q. (By Mr. Hofeldt): Did you subsequent to 1949 change your method of taping these together in an end-to-end relationship?

A. No. I answered that before. Up to August, 1951.

Q. In August, 1951 there was a change made?

A. Approximately August, 1951, yes, sir.

Q. What was that change?

A. That is when we started to apply tension to the tape to make it go around the contours of the bead and then on to the wall of the can or label.

Q. Why was that desirable?

A. In order to keep these cans fastened securely in an end-to-end position so they would not come apart without cutting the tape or pulling the tape off.

Q. Did you order a different type of tape from Minnesota Mining or from anybody else at that time?

A. Minnesota Mining from time to time had trouble with their own tape. As I told you, it was breaking on the tape roll itself, so we went to another supplier because their type of tape was not suitable to us. We wrote to them accordingly. They did everything they could to keep the business.

(Deposition of Jeno F. Paulucci.)

Mr. Schroeder: You say "their kind of tape,"—to whom do you refer?

The Witness: Minnesota Mining.

Q. (By Mr. Hofeldt): Did you thereupon cease to buy tape from Minnesota Mining? [107]

A. No, sir.

Q. You still bought tape?

A. Yes, sir, but they were trying to perfect it. They also suggested different ways of keeping the tape in a humid room and so forth. We did that in order to co-operate with them so we might continue to buy tape from them.

Q. Did you buy substantial quantity of tape from Minnesota Mining after August of 1951?

A. Not directly from them. They had jobbers in Duluth.

Q. Or from their jobbers?

A. That is correct.

* * * * *

Q. (By Mr. Hofeldt): The change, as I understand it then, was to apply tension so that the edges of the tape would adhere to the walls of each can, is that correct? A. Not completely.

Q. What other changes were——

A. So that it went around the contours of the beads themselves in such a manner that it completely or practically welded them together, so that the edges then of the tape would touch the walls of the can, or the label.

* * * * *

Q. (By Mr. Hofeldt): In August, 1951, did

(Deposition of Jeno F. Paulucci.)

you change your method of taping cans together in an end-to-end relationship?

A. Yes.

Q. How did you change it from what previously had been done?

A. As I told you before by applying tension to the tape so that it would go around the contours of the beads of the cans to practically weld them together with some of the parts of the sides [108] of the tape touching either the side walls and/or the labels and the cans.

Q. How much tension did you apply?

A. Sufficient to cover the contours of the beads so that the two cans or two beads were practically welded together so that they went around the contour of the bead of the cans to practically weld them together with some of the parts of the sides of the tape touching either the side walls and/or the labels or the cans, and did not break the tape.

Q. So in a measure at least it would depend upon the type of tape you were using?

A. Not especially.

Mr. Schroeder: It would have to be limited by the strength of the tape?

The Witness: That is right.

Q. (By Mr. Hofeldt): It would depend upon the type of tape you were using, would it not?

A. Yes, we had to use the right type of tape for it.

Q. What was that type?

A. The type of tape that would give us enough

(Deposition of Jeno F. Paulucci.)

tension to go around the contours of the beads in the manner I have described heretofore.

Q. You don't know in pounds how much tension that would have to be? A. No, sir.

Q. When did you get your idea for the change?

A. Around July of 1951, June or July.

Q. Whom did you tell this idea to?

A. Well, our plant superintendent, Jim Bingham.

Q. Anyone else?

A. I don't remember. [109]

Q. Prior to this time that you got this idea, did you ever have instances where the tape did not conform to the beads of the can in the manner you have specified?

A. Not to my knowledge.

Q. You had never seen that happen?

A. I don't remember.

Q. Did you change at that time the type of tape you were using? A. I don't remember that.

Q. How, in August, 1951, did you apply tension to the tape?

A. By taking the tape and applying it to the beads of the can, holding the cans in the trough, rotating the cans within the trough, tightly, so that the tape went around the contours of the beads as heretofore described, and then the tape was cut from the dispenser and held tight, and rotated the balance of the can, and overlapped a little bit the other end of the tape.

Q. As it came around the can?

(Deposition of Jeno F. Paulucci.)

A. Yes, sir.

Q. How did you stretch your tape or hold it? By what manner?

A. The dispenser on the one hand was fixed so that it was not movable that held the tape on the one hand.

The loose end of the tape, as I mentioned, was applied to the beads of the can. Then the cans were rotated and the tape then cut from the dispenser and then that was held tightly so that that was under tension and went around the beads of the can.

Q. How was it held tightly?

A. With the right hand or left hand.

Q. By the operator?

A. After it was cut.

Q. In other words, the human operator held that tape tight?

A. It was just at the last part, the part that was cut from there in order to finish the taping operation. [110]

Mr. Schroeder: What provided the tension in the intermediate part?

The Witness: The rolling means. This roll of tape also moved. In other words, this was closer like this (indicating).

Q. (By Mr. Hofeldt): Now you are using Paulucci deposition Exhibits No. 1 to 4, are you not?

A. Yes, except this machine here is not affixed properly.

Q. Shall I hold it?

(Deposition of Jeno F. Paulucci.)

A. Go ahead and hold it. It is not fixed properly here, so I did not get the right measure of tape.

The last step was where we would take the, keep stretching it, but that was against this, don't forget. It is impossible for me to show you here.

You see the way it has gone over the contours of the beads and the side wall of the cans?

Well, these have no labels now.

Q. Yes.

A. This, of course, is a poor trough, so it is impossible for me to show you, but at least you can get an idea.

Q. It is a V-shaped trough though?

A. Well, there would be a lot of V-shaped troughs, but this is not according to ours.

Q. It took a particular V-shaped trough to do this now?

A. I am not used to this, so it is difficult for me to do it properly with this.

Q. You would have to do it properly with a particular V-shaped trough, is that right?

A. The method of putting it on is not limited solely to the exact dimensions of the trough. The trough and the dispenser are means to an end to the method, but actually you can take the two [111] cans with tension and hold the two cans in your hand and apply them with tension and have the same results as my patent.

Does that answer your question?

* * * * *

Q. Now, in this method that you used after

(Deposition of Jeno F. Paulucci.)

August, 1951, you held the cans in the trough, did you not?

A. Rotated them in the trough.

Q. But they were not moving relatively to the dispenser, were they?

A. I don't follow your "relatively" word.

Q. Excluding the rotation, physically the cans did not move toward or away from the dispenser?

A. Not according to the general practice.

Q. Are you the Jeno F. Paulucci who is the patentee of the patent in suit? A. I am.

Q. Did you authorize the filing of the complaint in this action? A. I did.

Q. This V-shaped trough you used after August, 1951, were there any changes from it with respect to the V-shaped trough that had been used previously?

A. I said we had used an angle iron previously.

Q. Was that a V-shaped angle iron?

A. Yes, depending on how you put it on.

Q. How was it put up on your operations prior to August, 1951?

A. As I remember it, so that the bottom of the angle——

Q. The corner?

A. The corner of the angle rested on the table.

Q. It was secured as V with respect to the table?

A. Yes, that is the way it would end up, yes.

Q. Now, did you build an apparatus to perform

(Deposition of Jeno F. Paulucci.)

this method that you were using after August, 1951? [112]

A. I had it built for me, yes.

Q. Who built it for you?

A. I believe Jim Bingham did, or somebody built it for him.

Q. Did you have any drawings?

A. No, sir.

Q. Had you right up to August, 1951, from sometime in 1949, been selling products in cans where the cans were taped together in an end-to-end relationship? A. Yes.

Q. There was no interruption then, was there, in this particular type of packaging going to the public?

A. Well, I can't answer your question in that manner, because they weren't all the same items after August, 1951.

Q. Forgetting about the items, just any food product in cans, in which the cans were taped end-to-end, had there been any interruption from 1949, April I believe you testified, to August, 1951?

A. On certain specific products there was no interruption.

* * * * *

Q. Do you know what a resilient tape is?

A. Resilient tape is one that has a little stretch to it, is it not?

Q. I am asking you. You are on the stand now.

Mr. Schroeder: Tell what your understanding is of it.

(Deposition of Jeno F. Paulucci.)

The Witness: My understanding: resilient has a little stretch to it.

Q. (By Mr. Hofeldt): How about slightly resilient? What would that mean to you?

A. With maybe a little less stretch.

* * * * *

Q. In purchasing your tape from any source, have you ever specified the amount of resiliency that was necessary in that tape for your purposes?

A. Positively not.

Q. You never have?

A. Not specified it per se itself.

Q. What do you mean by "per se"?

A. Well, any pounds as you tried to bring out a little while ago.

Mr. Schroeder: He means he tried the tape.

Q. (By Mr. Hofeldt): It has been a matter of trial and error, is that it?

A. From that we knew the type of tape we wanted and we bought that particular type of tape.

Q. Since August, 1951, have you ever had a tape that did not work?

A. At times, yes, sir.

Q. What type of tape was it that did not work?

A. It was not so much the type of tape but rather the storage conditions under which the tape was kept.

Q. So, excluding storage conditions and the effect of humidity, you never had a type of tape that did not work?

A. I cannot say that.

(Deposition of Jeno F. Paulucci.)

Q. You don't know?

A. I cannot remember.

* * * * *

Q. Both of these operations, those from 1949 to August, 1951, and the operations subsequent to 1951, are essentially hand operations, are they?

A. To date, yes, sir.

You are referring to our operations? I presume you are referring to our operations. [114]

* * * * *

4.

The questions and answers set forth in Request 3, above, were, respectively, so put to said Jeno F. Paulucci and so answered by him under oath at said deposition on August 4, 1955.

Dated: November 9, 1955.

HARRIS, KIECH, FOSTER & HARRIS,
FORD HARRIS, JR.,
WALTON EUGENE TINSLEY,

/s/ By FORD HARRIS, JR.,
Attorneys for Defendant. [115]

Acknowledgment of Service Attached. [116]

[Endorsed]: Filed November 10, 1955.

[Title of District Court and Cause.]

OPINION

Yankwich, Chief Judge:

The plaintiff by this action seeks injunction and damages for patent infringement and unfair competition. [28 U.S.C.A., § 1338(a) and (b)] The patent involved is No. 2,679,281, issued on May 25, 1954, to Jeno Francis Paulucci. The defendant denies infringement, challenges the validity of the patent, and, in an counterclaim, asks for a declaration of invalidity. While the original pleadings as to the cause of action for infringement related to all three claims of the patent in suit, the plaintiff, at the trial, restricted itself to a charge of infringement of Claim 1 only.

I.

Validity and Infringement

The object of the patent in suit is to join cans so that canned foods might be sold together and is on "a method and means for securing cans together in end-to-end relationship." Claim 1 describes it:

"1. The method of securing two cans together said cans having beaded ends protruding beyond their side walls, comprising (1) aligning said cans in end-to-end relationship with adjacent end beads of said cans abutting each other, (2) stretching a portion of a slightly resilient sticky tape and applying said portion of said tape over portions of the abutting beads and adjacent side walls of said [118] cans while said tape is in a stretched condition to

secure said cans together; (3) pulling on the portion of said tape not secured to said can in a direction substantially tangential to the periphery of the cans to place same in a stretched condition to cause said tape to be applied and adhere to the remainder of the periphery of said beads and adjacent side walls of said cans."

[For convenience of reference, we have numbered the four elements of the claim.][1]

While the scope of the claim is narrow, it represents invention over the prior art. [35 U.S.C.A., § 103; Pointer v. Six-Wheel Corp., 9 Cir., 1949, 177 F. 2d 153, 160-161; Pacific Contact Laboratories v. Solex Laboratories, 9 Cir., 1953, 209 F. 2d 529, 532-533; Jeoffroy Mfg. Co. v. Graham, 5 Cir., 1953, 206 F. 2d 772, 776-778; Stearns v. Tinker & Rasor, 9 Cir., 1955, 220 F. 2d 49, 57-58] There is no merit to the contention that it is anticipated in the prior art. [35 U.S.C.A., § 102] Admittedly, the two best references (T.H. Nifong, 2120504, June 14, 1938, and Arnold E. Johnson, 2652166, September 15, 1953) do not contain the element which we have marked (2). There is no method in either for applying tension to or stretching the tape either before or after application in order to cause it to pass around an irregular contour so as to secure, in effect, a welding as set forth in the patent in suit. There is, therefore, absent an important element [119] of the method and the desirable result which

---

[1] The Letters Patent are attached as Exhibit A at the end of the opinion.

its combination with the other elements achieves. And there can be no anticipation unless all the elements of the invention or their equivalents are found in a prior invention where they achieve the result in substantially the same manner. [Bianchi v. Baroli, 1948, 9 Cir., 168 F. 2d 793, 795-796; Allied Wheel Products v. Rude, 1953, 6 Cir., 206 F. 2d 752, 755-756]

The burden of establishing anticipation rests heavily on him who charges it. [Radio Corp. v. Radio Engineering Laboratories, 1934, 293 U.S. 1, 7-9; Marconi Wireless Co. v. United States, 1943, 320 U.S. 1, 34-35; Paraffine Companies v. McEverlast, Inc., 1936, 9 Cir., 84 F. 2d 335, 339; Insul-Wool Insulation Corp. v. Home Insulation, 10 Cir., 1949, 176 F. 2d 502, 504-505]

There is evidence in the record that the Minnesota Mining & Manufacturing Company made several attempts to construct a machine for the plaintiff for the purpose of achieving the result finally attained by this invention. They were interested in selling to the plaintiff their patented tape. Their employees were allowed on the premises of the plaintiff to see, and participated in, the experiments being carried on. Whether they were pledged to secrecy is not material. They knew that experiments were being carried on and the plaintiff had the right to rely on the decencies of ethical conduct which forbid a concern dealing with another to disclose to others experimental demonstrations and uses carried on in order to enable the two parties to deal in the future on more favorable terms. [120]

I am quite certain that the Minnesota Mining & Manufacturing Company did not act with deception. And there is direct testimony in the record that their representatives, who saw certain experiments anticipatory of the invention, understood that these were private experimental attempts to achieve certain results and did not amount to public disclosure or use of the method that was later patented. It would be a sad commentary on the ethics of business, indeed, if, on the basis of the facts disclosed here, an infringer could benefit by what would be a breach of trust. But ethics aside, legally the efforts were purely experimental, did not amount to public use, and were not anticipatory. [Electric Storage Battery Co. v. Shimadzu, 1939, 307 U.S. 5, 20; Merrill v. Builders Ornamental Iron Co., 1952, 10 Cir., 197 F. 2d 16, 18-19; Pacific Contact Laboratories v. Solex Laboratories, 1953, 9 Cir., 209 F. 2d 529, 534] More, the experiments were not successful as the models constructed with the aid of Minnesota Mining & Manufacturing Company proved unworkable. Only after their abandonment was the present novel and successful invention devised.

"* * * And a prior unsuccessful experiment does not constitute invention and cannot therefore be an anticipation." [Pacific Contact Laboratories v. Solex Laboratories, supra, p. 532]

So the claim of invalidity by reason of prior public disclosure or use in 1950 or 1951 made in the counterclaim must fail. [121]

The method used by the defendant infringes

Claim 1 for it uses, without deviation, the four steps described in the Claim, as was clearly demonstrated when the machine was operated at the trial. While thus satisfied that there has been deliberate infringement of the plaintiff's patented method, I am of the view that the plaintiff is not entitled to recover on the claim or cause of action for unfair competition. [28 U.S.C.A., § 1338(b)]

II.

Tests for Determining Unfair Practices

Unfair competition or unfair practices are condemned because they lead to confusion of sources of goods. [Restatement, Torts, §728] The test for determining the existence or non-existence of confusing similarity has been stated in this manner:

"The ultimate test of whether or not there is a confusing similarity between a designation and a trade-mark or trade name which it is alleged to infringe is the effect in the market in which they are used. In some cases the probable effect can be determined by a mere comparison of the designation with the trade-mark or trade name. In other cases extrinsic evidence may be necessary. In any event, the issue is whether an appreciable number of prospective purchasers of the goods or services in connection with which the designation and the trademark [122] or trade name are used are likely to regard them as indicating the same source. That a few particularly undiscerning prospective purchasers might be so misled is not enough. On the other hand, it is enough that an appreciable

number of purchasers are likely to be so misled, even though by exercising greater discernment they could avoid the error." [Restatement, Torts, § 728] [Emphasis added]

In most cases of this character, instances of actual confusion by purchasers are offered and received in evidence. Surveys and polls conducted by individuals or research organizations are also used. [Laskowitz, v. Marie Designer, Inc., 1954, D.C. Cal., 119 F. Supp. 541, 550; Note, Public Opinion Surveys as Evidence, 1953, 66 Harv. L. Rev., p. 498]

There is no such evidence in this case. We are, therefore, to determine whether,—to paraphrase the language of the Restatement—an appreciable number of prospective purchasers of the goods are likely to regard them as coming from the same source. So doing, we disregard what the Restatement calls "the undiscriminating prospective purchaser," and are guided by the effect upon the person who looks for brand names. [Restatement, Torts, § 717, Comment (b); & 727]

The test by which is determined the likelihood that confusion might be engendered in a purchaser's mind is given in the Restatement in this manner: "* * * Under the rule stated in this Section, the likelihood that prospective purchasers will regard the use of the designation in the manner stated must be substantial. That there is a very remote possibility that prospective purchasers generally will so regard the use is not enough. Nor is it enough that there is strong likelihood that one or

two prospective purchasers will be so misled. On the other hand, the rule does not require a probability of general confusion among most of the prospective purchasers. Compare §728, Comment (a) "[Restatement, Torts, § 727] [Emphasis added]

[See, Restatement, Torts, § 730, Comment (b)]

These criteria have the approval of California courts. Scudder Food Products v. Ginsberg, 1943, 21 C(2) 596, 599-602; Weatherford v. Eytchison, 1949, 90 C.A.(2) 379, 384; Schwartz v. Slenderella Systems of Cal., 1954, 43 C(2) 107, 112; Sunlite Bakery v. Homecraft Baking Co., 1953, 119 C.A. (2) 143, 150.] And in their application, similarity and not complete identity is the determinant factor. [Jackman v. Mau, 1947, 78 C.A.(2) 234, 239; American Distilling Co. v. Bellows & Co., Inc., 1951, 102 C.A.(2) 8, 23; Palmer v. Gulf Pub. Co., 1948, D.C. Cal., 79 F. Supp. 731; Lane Bryant, Inc. v. Maternity Lane, Ltd., 1949, 9 Cir., 173 F. 2d 559, 564; and see, Comment: Trade Name, Infringement as Unfair Competition, 1952, 40 Cal. L. Rev. 571; Note, Trade-Marks, Unfair Competition and the Courts, 1953, 66 Harv. L. Rev. 1094] [124]

If a secondary meaning is established, any copying may be unfair competition. However,

"To establish secondary meaning, the article itself must be so clearly identified with its source that its supply from any other source is clearly calculated to deceive the public and lead it to purchase the goods of one for that of another. Sinko v. Snow Craggs Corp., 7 Cir., 105 F. 2d 450. To acquire a secondary meaning in the minds of the buying pub-

lic, an article of merchandise when shown to a prospective customer must prompt the affirmation, 'That is the article I want because I know its source,' and not the negative inquiry as to, 'Who makes that article?' In other words, the article must proclaim its identification with its source, and not simply stimulate inquiry about it." [Zangerle & Peterson Co. v. Venice Furniture Novelty Mfg. Co., 1943, 7 Cir., 133 F 2d 266, 270] [Emphasis added]

III.

No Confusing Similarity

In the case before us, similarity is claimed in the use of colors and illustrations in combination on labels for cans and cartons. The primary colors of the spectrum are seven in number. A person cannot acquire a right to use colors singly or in combination. The law will not give protection unless colors are combined [125] with design or symbols in such a manner as to become a distinctive means of identifying one's product. Otherwise put, only colorable imitation of a distinct form which amounts to a fraudulent appropriation of another person's original design will be protected. [See, Modesto Creamery v. Stanislaus Creamery Co., 1914, 168 C 289; So. Calif. Fish Co. v. White Star Canning Co., 1920, 45 C.A. 426, 431-432; Eastern-Columbia, Inc. v. Waldman, 1947, 30 C.(2) 268; Smith, Kline & French Laboratories v. Clark & Clark, 3 Cir., 1946, 157 F. 2d 725, 729-730; American Chicle Co. v. Topps Chewing Gum, 2 Cir., 1953, 208 F. 2d 560; American Chicle Co. v. Topps Chewing Gum, 2 Cir.,

1954, 210 F. 2d 680; Smith, Kline & French Laboratories v. Heart Pharmaceutical Corporation, S.D. N.Y., 1950, 90 F. Supp. 976; Esso Standard Oil Co. v. Bazerman, E.D. N.Y., 1951, 99 F. Supp. 983; H. Moffatt Co. v. Koftinow, 1951, 104 C.A.(2) 560, 564-565; MacSweeney Enterprises, Inc. v. Tarantino, 1951, 106 C.A.(2) 504, 510-514; Haeger Potteries v. Gilner Potteries, D.C. Cal., 1954, 123 F. Supp. 261.]

The evidence in the record shows that the use by the defendants of colors and silhouettes or,—as one witness called them—"vignettes", on cans containing Chinese foods preceded by many years their use by the plaintiff. Indeed, the defendants were in the field of selling canned oriental foods long before the plaintiffs. Both California and federal law protect the first user: [15 U.S.C.A., § 1052(d), (e)(1), (f); California Bus. & Prof. Code, §§ 14270, 14400] But, in order to be guilty of unfair [126] practice, the late-comer must imitate size, shape, style and color arrangement so as to produce a colorable imitation of the representation of his rival's product. [American Distilling Co. v. Bellows & Co., 1951, 102 C.A. (2) 8, 21-26; Scudder Food Products v. Ginsberg, 1943, 21 C(2) 596, 601-602; Albert Dickinson Co. v. Mellos Peanut Co., 7 Cir., 1950, 179 F. 2d 265, 269-270] Side by side comparison is not conclusive. But, in determining likelihood to create confusion, the cases just cited teach that the tout ensemble of the article as it appears to the average buyer is to be considered. Doing this, it is quite apparent that there is no confusing similarity here. In both in-

stances, there is a combination of colors, vignettes, pictures of dishes and words. But there is no limitation or simulation of the lettering, the form, the script, scrolls or any of the symbols used by the plaintiff. The designation and pictorial representation of the foods and of the elements composing them are the same because the names such as chow mein, chop suey and the like, have been long known by these names, and have been made in certain combinations in Chinese cookery from time immemorial. And there can be no exclusive appropriation of an accepted method of designating the character, kind and composition of a product. [Italian Swiss Colony v. Italian Vineyard Co., 1910, 158 Cal. 252, 257; Scudder Food Products v. Ginsberg, 1943, 21 C.(2) 596, 600]

An examination of the tout ensemble of the labels on cans that have been pointed to as the most likely to cause confusion (Exhibits 3 and 3A—cans containing "chop suey") show such deviation in pattern, description and arrangement that it is unlikely that a person looking for the Chun King brand would pick up the can distinctly marked Jan-U-Wine which is the defendant's [127] brand. There is no attempt to imitate the script. Even the height of the cans is not the same. Indeed, while the two colors are yellow and red, the shades are different. A casual buyer who did not buy by the brand might pick up one can for the other. But in that case, he is not the plaintiff's prospective customer. On the contrary, he is in the market for Chinese food and his selection of one against the other does not in-

volve the type of choice as to which the law is anxious to avoid confusing deception. As stated by the Court in Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co., 1942, 316 U.S. 203, 205:

"If it is true that we live by symbols, it is no less true that we purchase goods by them. A trademark is a merchandising short-cut which induces a purchaser to select what he wants, or what he has been led to believe he wants. The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol. Whatever the means employed, the aim is the same—to convey through the mark, in the minds of potential customers, the desirability of the commodity upon which it appears. Once this is attained, the trademark owner has something of value. If another poaches upon the commercial magnetism of the symbol he has created, the owner can obtain legal redress." [Emphasis added] [128]

A trade symbol must be attached to a product. And unless the product has become identified with the symbol, the law does not protect against competitors who sell the identical product. Where, as here, there is no evidence of actual confusion, the Court, in determining the likelihood of confusion, must attempt to "approximate the position of an ordinary purchaser." [Rudolph Callman, 1950. The Law of Unfair Competition and Trade-Marks. 2 Ed., Vol. 3, & 81.1, p. 1376] Of necessity, such approximation involves factors often unprecise, and, at times, imponderable. As stated by the Court

of Appeals for the Seventh Circuit in Colburn v. Puritan Mills, Inc., 7 Cir., 1939, 108 F. 2d 377, 378:

"The ascertainment of probability of confusion because of similarity of trade names presents a problem not solvable by a precise rule or measure. Rather is it a matter of varying human reactions to situations incapable of exact appraisement * * * Is the similarity of name or dress such as to delude the public or will the prospective buyer readily differentiate between the two names? We can only contemplate, speculate, and weigh the probabilities of deception arising from the similarities and conclude as our and the District Judge's reactions persuade us." [Emphasis added]

[And see, Albert Dickinson Co. v. Mellos Peanut Co., 7 Cir., 1950, 179 F. 2d 265, 269-270.]

The sale of Chinese foods in combination cans was not an innovation of the plaintiff. The plaintiffs are entitled to the [129] benefit of such custom as they have developed, even as a new-comer. But they are not entitled to a monopoly of the field. Nor are they entitled to be free from competition in the choice of what the Supreme Court has called "congenial symbols" [Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co., supra], whether they relate to color, lettering, illustrations or other embellishments aiming to attract the potential customers unless one of two conditions is fulfilled, — (1) that there is an actual showing of confusion of source. [Sunbeam Corporation v. Sunbeam Lighting Co., D.C. Cal., 1949, 83 F. Supp. 429; Sunbeam Corporation v. Sunbeam Lighting Co., 1950, 183 F. 2d 969;

Sunbeam Corporation v. Sunbeam Furniture Corp., D.C. Cal., 1950, 88 F. Supp. 852; Sunbeam Furniture Corp. v. Sunbeam Corporation, 9 Cir., 1950, 191 F. 2d 141; Silvers v. Russell, D.C. Cal., 1953, 113 F. Supp. 119] or (2) that there is likelihood of such confusion. [Palmer v. Gulf Pub. Co., D.C. Cal., 1948, 79 F. Supp. 731]

In what precedes we have already shown why the label relating to "beef chop suey" which presents the most numerous elements of similarity, does not, in the light of declared principles, infringe upon any of the rights of the plaintiffs. Nor, in our view, do the other labels or symbols on cans and cartons which have been pointed to in the evidence as showing confusing similarity, satisfy the legal norms of unfair practices. The language which the California District Court of Appeals used in a similar case in which a trial court actually granted injunctive relief against a color and figure combination used by fish canner could well sum up the reasons for denying relief in this case: [130] "Nor is plaintiff's case helped by the fact that dark blue, the color of the background, is the predominant color in both labels, though it is apparent that the gravamen of plaintiff's charge lies in an alleged imitative color scheme. It is the one specific feature emphasized by the plaintiff throughout the case. It is true that sometimes a color taken in connection with other characteristics, may serve to distinguish one's goods, and thus be protected by the courts. (Fairbanks Co. v. Bell Mfg. Co., 77 Fed. 869 (23 C.C.A. 554)—a case where, however, there was proof of specific

instances of deception.) But as a rule a color cannot be monopolized to distinguish a product. There are not more than seven primary colors, and if one of these may be appropriated as a distinguishing characteristic of a label, it would not take long to appropriate the rest. Thus, by appropriating the colors, the packing of tuna could be monopolized by a few vigilant concerns. To allow colors to be appropriated would foster monopoly by foreclosing the use by others of any tasty dress; and where the difference between plaintiff's and defendant's labels are so marked in other respects that, in the absence of identity of color, there can be no possibility of confusion, a charge of unfair competition falls to the ground." [So. Cal. Fish Co. v. White Star Canning Co., 1920, 45 Cal. App. 426, 431] [Emphasis added] Our own Court of Appeals has stated that there could be no recovery for unfair competition unless

"* * * the name or appearance of the injured product has acquired either a technical trade-mark or a secondary [131] meaning." [Ross-Whitney Corp. v. Smith, Kline & French Laboratories, 9 Cir., 1953, 207 F. 2d 190, 196;

[See, Pacific Contact Laboratories, Inc. v. Solex Laboratories, Inc., 1953, 9 Cir., 209 F. 2d 529, 534]

The conditions which would give rise to a secondary meaning for the plaintiff's labels do not exist in this case. For the plaintiff's method of packaging or labelling has not become indentified in the eyes of purchasers of Chinese foods with the plaintiff's

product. [See, Zangerle & Peterson Co. v. Venice Furniture Novelty Mfg. Co., 7 Cir., 1943, 133 F. 2d 266, 270] These considerations gain added strength when it is borne in mind that, as already appears, the defendant preceded the plaintiff in the field and that the use by it of distinctive identifying symbols singly and in combination preceded use by the plaintiff. To this situation the language of Judge Learned Hand in American Chicle Co. v. Topps Chewing Gum, 1953, 2 Cir., 208 F. 2d 560, 563, is very apposite:

"It cannot be denied that courts have at times reasoned as though a second comer were free to divert a first comer's customers, if he confined himself to those who were unduly careless. If the issue were whether such buyers could complain that they did not get what they wanted, it might be an answer in the second comer's mouth that they had themselves to thank for their failure to look more closely at the 'make-up'; though even that is a doubtful answer. Be that as it may, the issue becomes altogether different when it is between a first and a second comer, for the first comer's customers are as valuable to him as any others; and their carelessness can hardly be charged to him.— Why they should be deemed more legitimate game for a poacher than his careful buyers, it is hard to see, unless it be on the ground that he should have made his mark so conspicuous that it would serve to hold even the most heedless." [Emphasis added]

Judgment will therefore be for the plaintiff on the

first cause of action only that Claim 1 of the patent in suit is valid and infringed.

Dated: December 13, 1955.

/s/ LEON R. YANKWICH,
Judge [133]

[Note: Patent No. 2,679,281, Exhibit A is set out in Book of Exhibits.]

[Endorsed]: Filed Dec. 13, 1955.

In the United States District Court, Southern District of California, Central Division

Civil Action No. 17882-Y

CHUN KING SALES, INC., and JENO F. PAULUCCI, Plaintiffs,

vs.

ORIENTAL FOODS, INC., Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT

Findings of Fact

1.

Plaintiff, Chun King Sales, Inc., is a corporation organized and existing under the laws of the State of Minnesota, having a regular and established place of business at Duluth, County of St. Louis, State of Minnesota.

2.

Plaintiff, Jeno F. Paulucci is a citizen of the

United States of America and a resident of Duluth, County of St. Louis, State of Minnesota.

3.

Defendant, Oriental Foods, Inc., is a corporation organized and existing under the laws of the State of California, and has its principal place of business at 7272 East Gage Avenue, Bell (Bell Gardens), County of Los Angeles, California. [138]

4.

The Court has jurisdiction of this cause of action under 28 U.S.C. 1338 and under 28 U.S.C. 1332.

5.

Plaintiff, Jeno F. Paulucci, is the owner of all right, title and interest in and to United States Letters Patent No. 2,679,281.

6.

Plaintiff, Chun King Sales, Inc., is the exclusive licensee under said United States Letters Patent No. 2,679,281.

7.

The invention of the Paulucci patent No. 2,679,-281 resides in causing the tape to pass around an irregular contour to engage the side walls of two abutting cans, as well as the beads thereof in a stretched condition, whereby the tape is extended transversely of its length at an intermediate section with the result that the tape adheres completely to the beads of the can ends, holding the cans as "welded" together.

8.

In the art of food distribution a real problem existed in the stable and economical distribution and sale of multiple cans of related merchandise as a single sales item. This problem included the permanent association of the multiple cans so that the retailer did not separate the associated cans to sell the same separately and also the need of an inexpensive means of securing the cans together, which would also permit their easy separation by the ultimate purchaser. [139]

9.

The Paulucci patent No. 2,679,281 in suit teaches a solution to the problem set forth in Finding 8, and this solution is defined by claim 1 thereof.

10.

The invention of claim 1 of the Paulucci patent No. 2,679,281 in suit has had wide commercial success.

11.

It required the exercise of inventive faculty over and above the knowledge of the prior art to invent the method defined by claim 1 of Paulucci patent No. 2,679,281.

12.

The method defined by claim 1 of the Paulucci patent No. 2,679,281 produces a result in excess of the accumulation of results of the individual elements of the claim in causing the tape to pass around an irregular contour to engage the side walls of the two cans as well as the beads thereof in

a stretched condition, whereby the tape is extended transversely of its length at an intermediate section with the result that the tape adheres completely to the beads of the can ends holding the cans as "welded" together.

13.

Claim 1 of the Paulucci patent No. 2,679,281 in suit defines an invention first made by Jeno F. Paulucci, which overcame the problem existing in this art.

14.

The method used by defendant utilizes each of the steps, having the same mode of operation and producing the same result as the method disclosed and set forth in the Paulucci patent No. 2,679,281 and defined by claim 1. [140]

15.

The method employed by defendant used the invention of the Paulucci patent No. 2,679,281 as set forth in Finding 8 and defined by claim 1 of the patent.

16.

Defendant has failed to establish any instance of prior knowledge or invention of the method disclosed and claimed in the Paulucci patent No. 2,679,281, nor any solution of the problem in this art first solved by Jeno F. Paulucci.

17.

All prior attempts at a solution to the problem by both plaintiffs and defendant prior to the inven-

tion of Paulucci proved a failure and were abandoned.

18.

The prior patents and publications relied upon by defendant do not anticipate or limit claim 1 of the Paulucci patent No. 2,679,281 in suit, and fail to teach a solution of the problem first successfully solved by Jeno F. Paulucci.

19.

The prior art does not anticipate the invention defined by claim 1 of the Paulucci patent No. 2,679,281.

20.

The prior methods used by Minnesota Mining & Manufacturing Company were unsuccessful and unworkable and did not constitute an anticipation of the Paulucci patent No. 2,679,281, and specifically claim 1 thereof.

21.

The work done by Minnesota Mining & Manufacturing Company and the methods used therein prior to the invention of the patent [141] in suit did not utilize the invention defined by claim 1 of the patent No. 2,679,281.

22.

The work done and method used by Minnesota Mining & Manufacturing Company prior to the invention of the patent No. 2,679,281 in suit was a prior unsuccessful experiment and was not an anticipation.

23.

The method described in Pauluccci patent No. 2,679,281 and defined in claim 1 thereof constitutes an invention over the prior methods utilized by Minnesota Mining & Manufacturing Company.

24.

There was no instance of prior public knowledge or use of the method defined by claim 1 of Paulucci patent No. 2,679,281 established.

25.

There has been no proof of confusion in the industry as to the source of goods sold by defendant.

26.

No appreciable number of prospective purchasers of these goods of the class that the law protects are likely to be confused as to the source thereof.

27.

The labels of both plaintiffs' and defendant's goods are a combination of colors, vignettes, pictures of dishes and words. [142]

28.

There is no simulation by defendant of the lettering, form, script, scrolls or any of the symbols used by plaintiffs.

29.

By comparison of the tout ensemble of the labels there is no confusing similarity between same.

30.

A casual buyer who did not buy by the brand name might pick up one can for the other.

31.

A buyer who was looking for plaintiffs' Chun King brand can would not be likely to pick up defendant's Jan-U-Wine brand can.

Conclusions of Law

I.

The Letters Patent No. 2,679,281 was duly and legally issued on May 25, 1954. That the plaintiff, Jeno F. Paulucci, is the owner of the entire right, title and interest in and to said Letters Patent and the plaintiff, Chun King Sales, Inc., is the exclusive licensee under said Letters Patent.

II.

That Claim 1 of Letters Patent No. 2,679,281 in suit is good and valid in law and that said Claim 1 covers a new and meritorious invention.

III.

That defendant has infringed Claim 1 of said Letters Patent No. 2,679,281 in the method used by defendant in securing cans in end-to-end relationship. [143]

IV.

That plaintiff is entitled to a judgment and to an injunction and an accounting and costs as prayed for in the Complaint filed herein with respect to the

first cause of action for patent infringement limited to Claim 1 of said Letters Patent, and under the conditions set forth in Paragraph Nine of the Judgment hereinafter set forth.

V.

That defendant has not competed unfairly with plaintiffs.

VI.

That plaintiffs recover nothing by the second cause of action for unfair competition.

VII.

That plaintiffs are entitled to judgment on the counterclaim.

Judgment

In accordance with the foregoing findings and conclusions, it is ordered, adjudged and decreed:

1.

That plaintiff is the owner of the entire right, title and interest in and to Letters Patent No. 2,679,281, granted May 25, 1954, to Jeno F. Paulucci, together with all rights of action for infringement thereof, and plaintiff Chun King Sales, Inc., is the exclusive licensee under said patent.

2.

That Claim 1 of said Letters Patent No. 2,679,-281 is good and valid in law. [144]

3.

That defendants have infringed Claim 1 of Let-

ters Patent No. 2,679,281 by the use of the method of securing cans in end-to-end relationship.

4.

That defendants have not competed unfairly with plaintiffs.

5.

That plaintiffs herein have judgment on their Complaint for infringement of Claim 1 of Letters Patent No. 2,679,281, as prayed for.

6.

That plaintiffs recover nothing by the action for unfair competition.

7.

That plaintiffs have judgment on the counterclaim that Claim 1 of Letters Patent No. 2,679,281 is valid and that defendant recover nothing thereby.

8.

That a perpetual injunction be issued out of and under the seal of this Court, restraining the defendant, its officers, agents, servants, employees and those persons, companies or corporations in active concert or participation with them, from using or otherwise employing the method patented in and by said Letters Patent No. 2,679,281.

9.

That plaintiffs recover from defendant general damages which shall be due compensation for the using of the method patented in Letters Patent No. 2,679,281, together with an accounting thereof, in-

cluding such costs and interests as may be fixed by the Court, the damages to be ascertained by a Master to be appointed after the judgment to be entered [145] herein shall have become final.

10.

That plaintiffs recover from said defendant the taxable costs of plaintiffs in this Court and that plaintiffs shall have judgment for such costs, taxed in amount of $312.55.

Dated this 11th day of January, 1956.

/s/ LEON R. YANKWICH,
United States District Judge [146]

Affidavit of Service attached. [147]

[Endorsed]: Filed, Docketed and Entered Jan. 11, 1956.

[Title of District Court and Cause.]

DEFENDANT'S MOTION TO AMEND FINDINGS OF FACT

Now comes the defendant in the above-entitled action and pursuant to Rule 52(b) of the Rules of Civil Procedure hereby moves this Honorable Court to amend its findings of fact entered on January 11, 1956, therein, as follows:

Finding 7

Objections: This finding, we suggest, is entirely improper, because there is no evidence to support such a broad finding. Claim 1 of the patent in suit

sets forth four separate and distinct steps in the method, and if any finding is to be made as to the alleged invention it should do no more than paraphrase the four steps of claim 1. [151]

Authority: (1) The claims of the patent define and measure the invention:

See: Mantz v. Kersting, 29 F. Supp. 706; Blanchard v. Pinkerton, 77 F. Supp. 861; Ganter v. Unit Venetian Blind Supply Co., 89 F. Supp. 479.

Finding 10

This finding is, we suggest, improper because there is no evidence that the plaintiffs or anybody else ever employed any method of taping cans together in which the tape was stretched before being applied to the cans as required by Step No. 2 of claim 1 of the patent in suit. We suggest that this finding should be deleted, and that in lieu thereof the following should be substituted:

"10.

"The invention of claim 1 of the Paulucci patent No. 2,679,281 in suit has had no commercial success."

Finding 12

In this finding, the words "the tape is extended transversely of its length of an intermediate section" have no support in the evidence and should be deleted.

Findings 14 and 15

Findings 14 and 15 are objected to as being mere general statements of ultimate fact or conclusions

of law and not proper findings of fact as required by Schneidermann v. United States, 320 U. S. 118, 129, 63 S. Ct. 1333, 87 L. Ed. 1796. As pointed out by this Court in Brooks Bros. v. Brooks Clothing of California, [152] 5 F. R. D. 14 (1945), "findings of ultimate facts—as we were taught by the older authorities—are no longer sufficient." We suggest that it is incumbent on the Court to find specifically the facts, as shown by the evidence, upon which the conclusion of infringement is predicated. Our Court of Appeals has held that the findings should show the basis of the District Court's decision [Irish v. United States, 225 F. (2d) 3].

Finding 17

This finding should be amended to delete reference to defendant, because all of the evidence was to the effect that the hand taping method used commercially by the defendant starting in 1949 was substantially the same as its hand taping method used by it today.

Finding 20

The words "were unsuccessful and unworkable" should be deleted from this finding, as all of the evidence shows that the method of operation of the prototype machine sent by Minnesota Mining & Manufacturing Company to plaintiff Chun King Sales, Inc. in early 1951 was substantially the same as that practiced by the defendant's accused Dellenbarger machine.

Suggested Additional Findings

A number of essential issues were raised in this action as to which no findings of fact have been made and, we suggest, findings of fact should be made by the Court as to each, as follows:

Proposed Additional Findings:

"32.

"The defendant has not infringed either claim 2 or 3 of the Paulucci patent No. 2,678,281 in suit."

"33.

"Claims 2 and 3 of the Paulucci patent No. 2,678,281 are, and each of them is, invalid due to ordinary commercial public use of the apparatus covered thereby by the plaintiffs more than one year prior to the filing of said application and prior to the alleged date of invention thereof."

"34.

"Claims 2 and 3 of the Paulucci patent No. 2,678,281 are, and each of them is, invalid for lack of invention over the prior art."

Reasons for Adding 32 and 33:

The issues of both infringement and validity of claims 2 and 3 of the Paulucci patent were raised by the complaint, answer and counterclaim, and the Court should make findings of fact thereon.

See: Trico Products Corp. v. Anderson Co., 147 F. (2d) 721 (C.C.A. 7th 1945); Chiplets, Inc. v. June Dairy Products Co., Inc., 89 F. Supp. 814 (D. C. N. J. 1950); Oswego Falls Corp. v. American Seal-Nap Corp., 65 F. Supp. 338 (D. C. N. Y.

1946); De Cew v. Union Bag & Paper Corp., 59 F. Supp. 301 (D. C. N. J. 1945); Scovill Mfg. Co. v. United States Electric Mfg. Corp., 31 F. Supp. 115 (D. C. N. Y. 1940); Knaust Bros., Inc., v. Goldschlag, 28 F. Supp. 188 (D. C. N. Y. 1939).

Also, findings of fact should be made on all essential issues [See: Paramount Pest Control v. Brewer, 170 F. (2d) 553 (9th); [154] United States v. Trubow, 196 F. (2d) 161 (9th)]. Unless this Court makes specific findings as to claims 2 and 3 of the patent in suit, the action will probably be remanded for such findings, with the attendant unnecessary delays and expense to the parties.

Proposed Additional Finding:

"35.

"More than one year prior to the filing of the application for the Paulucci patent No. 2,678,281, and prior to the earliest date of invention thereof, the plaintiff Chun King Sales, Inc. was commercially securing two cans together in end-to-end relationship with sticky resilient tape by the use of the apparatus illustrated in Fig. 3 of said patent, and commercially sold substantial quantities of such cans so secured together."

Reasons for Adding 35:

There was a substantial issue as to whether the plaintiffs, or either of them, commenced commercial use of the apparatus of Fig. 3 of the patent in suit prior to the invention thereof, and as to the period

and extent of such use, and appropriate findings should be made on this issue.

Proposed Additional Finding:

"36.

"Commencing in 1949, and continuing through 1950, and until August, 1951, the plaintiff Chun King Sales, Inc. commercially secured together two cans of food in end-to-end relationship by using sticky, resilient tape applied to adjoining beads of the cans and the only difference between such method and that practiced later by the plaintiff under the patent in suit was the amount of tension [155] applied to the tape during application to the cans. Such products made in 1949, 1950, and 1951, by said plaintiff were extensively sold commercially."

Reasons for Adding 36:

There was a substantial issue of fact as to the nature of the original commercial taping operations of the plaintiff in the years 1949, 1950, and up to August, 1951, and, we suggest, the Court should make available findings with respect thereto.

Proposed Additional Finding:

"37.

"The hand-taping operations employed by the defendant commencing in 1949 and now used by the defendant do not infringe claim 1 of the Paulucci patent No. 2,678,281 in suit."

Reasons for Adding 37:

There was, and will continue to be, a substantial issue of fact as to whether the hand or manual taping operations of the defendant infringe claim 1 of the patent in suit and, we suggest, the Court should make a specific finding of fact on this issue.

Dated: January 20, 1956.

Respectfully submitted,

HARRIS, KIECH, FOSTER & HARRIS,
FORD HARRIS, JR.,
WALTON EUGENE TINSLEY,

/s/ By FORD HARRIS, JR.,
Attorneys for Defendant. [156]

Affidavit of Service by Mail Attached. [157]

[Endorsed]: Filed January 23, 1956.

United States District Court, Southern District of California, Central Division

No. 17,882-Y Civil

MINUTES OF THE COURT

Date: February 13, 1956. At Los Angeles, Calif.

[Title of Cause.]

Present: Hon. Leon R. Yankwich, District Judge. Deputy Clerk: Louis Cunliffe. Reporter: Marie

Zellner. Counsel for Plaintiff: Douglas Lyon and Lewis E. Lyon. Counsel for Defendant: Ford Harris, Jr.

Proceedings: For hearing on defendants' motions, pursuant to Rule 62(a) and 62(b), and on motion to amend findings, etc.

It Is Ordered that defendants' motion to amend findings is denied.

It Is Ordered that motion to stay costs and suspend temporary injunction pending appeal is granted to March 12, 1956. [158]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Oriental Foods, Inc., defendant in the above-entitled action, hereby appeals to the United States Court of Appeals for the Ninth Circuit from paragraphs 2, 3, 7, 8, 9, and 10 of the judgment docketed and entered on January 11, 1956, in the above-entitled action.

Dated: February 24, 1956.

HARRIS, KIECH, FOSTER & HARRIS,
FORD HARRIS, JR.,
WALTON EUGENE TINSLEY,

/s/ By FORD HARRIS, JR.,
Attorneys for Defendant. [159]

Affidavit of Service by Mail Attached. [160]

[Endorsed]: Filed February 24, 1956.

[Title of District Court and Cause.]

DEFENDANT'S MOTION FOR STAY OF INJUNCTION, ETC. PENDING APPEAL

Now comes the defendant in the above-entitled action and moves this Honorable Court for an order pursuant to Rule 62 of the Rules of Civil Procedure suspending the injunction presently issued and staying enforcement of the Judgment entered on January 11, 1956, pending determination of an appeal of said defendant from said Judgment to the United States Court of Appeals for the Ninth Circuit, a suggested form of order being attached hereto. This motion is based upon the following grounds:

(1) The continuance or issuance of an injunction pending determination of said appeal would cause irreparable damage to defendant;

(2) To permit execution pending a determination of appeal of the judgment for taxable costs might irreparably damage the defendant; [162]

(3) Plaintiffs cannot be prejudiced by such a stay, as their rights in the premises can be protected by a suitable bond required of defendant as a condition of such stay; and

(4) The status quo of the action should be preserved pending determination of said appeal.

In support of this motion, defendant will rely upon the pleadings and papers on file in this action,

upon the attached affidavit of Jaisohn Hyun, and upon Rule 62 of the Rules of Civil Procedure.

Dated: February 24, 1956.

Respectfully submitted,

HARRIS, KIECH, FOSTER & HARRIS,
FORD HARRIS, JR.,
WALTON EUGENE TINSLEY,
/s/ By FORD HARRIS, JR.,
Attorneys for Defendant. [163]

[Title of District Court and Cause.]

AFFIDAVIT OF JAISOHN HYUN

State of California
County of Los Angeles—ss.

Jaisohn Hyun, being duly sworn, deposes and says that:

I am executive vice-president of defendant Oriental Foods, Inc., the defendant in the above-entitled action, and am familiar with its business and operations.

The Dellenbarger machine illustrated in the photographs plaintiffs' Exhibits 21A to 21G, inclusive, the operation of which was held by the Court to infringe the patent in suit, was purchased by a purchase order dated May 3, 1954, by Oriental Foods, Inc. from Dellenbarger Machine Company, Inc., of 379 West Broadway, New York 12, New York, for the price of $1,550.00. At the time Ori-

ental Foods, Inc. so purchased said machine it had never heard of the Paulucci patent No. 2,679,281 in suit (which did not issue until May 25, 1954) and did not learn of the existence of said patent or of any claim of either of the plaintiffs to said action that Oriental Foods, Inc. was infringing said patent until it received written notice of such infringement on July 20, 1954, from counsel for the plaintiffs.

In the event that an injunction were to issue in the above action prohibiting Oriental Foods, Inc. from using said Dellenbarger machine, its business would be seriously disrupted, it would have difficulty in filling orders now on hand, and its reputation in the food packing business would be seriously injured thereby. To find and train a new crew of workers to tape cans by hand to replace the defendant's normal production by said Dellenbarger machine would require a substantial period of time and would seriously disrupt defendant's organization, its operations, and its ability to fill orders for its unpatented products.

/s/ JAISOHN HYUN.

Subscribed and sworn to before me, a Notary Public in and for said County and State aforesaid, this 20th day of February, 1956.

[Seal] /s/ BERNICE SHOEMAKER,
Notary Public. [165]

Affidavit of Service by Mail Attached. [166]

[Endorsed]: Filed February 24, 1956.

[Title of District Court and Cause.]

ORDER STAYING INJUNCTION AND FIXING BOND

The above-entitled action having this day come on for hearing upon the motion of defendant, Oriental Foods, Inc., for stay of injunction and enforcement of the judgment pending appeal, and a notice of appeal having been filed by said defendant in this Court on February 24, 1956, and for good cause shown,

It Is Hereby Ordered and Decreed, pursuant to Rule 62 of the Rules of Civil Procedure, that the injunction ordered to be issued by the Judgment of this Court entered on January 11, 1956, and the injunction issued on January 17, 1956, pursuant thereto, and execution on said Judgment, be and they hereby are suspended and stayed, pending the determination of the appeal or until further order of this Court, upon condition that the defendant file with the Clerk of this Court on or before March 19th, 1956, a good and sufficient bond in the sum of Eight Thousand ($8000.00) Dollars. [167] The condition of such bond shall be that if Oriental Foods, Inc. shall prosecute its said appeal to effect, or if it fails to make good its said appeal, shall answer all costs adjudged against it by reason thereof and shall pay plaintiff all damages which may be adjudged against defendant from and after the entry of the Judgment on January 11, 1956, until the final decision of the United States Court

of Appeals for the Ninth Circuit, then this obligation shall be void; otherwise, the same shall be and remain in full force and effect; provided, however, that this bond shall not be considered as securing the payment for any damages which may be adjudged against the defendant by reason of any use of the enjoined method prior to the making and entry of said Judgment on January 11, 1956. No separate bond on appeal need be filed under Rule 73(c) of the Rules of Civil Procedure.

Dated: This 5th day of March, 1956.

/s/ LEON R. YANKWICH,
United States District Judge.

Presented by:

HARRIS, KIECH, FOSTER & HARRIS,
/s/ By FORD HARRIS, JR.,
Attorneys for Defendant. [168]

[Endorsed]: Filed March 5, 1956. Docketed and Entered March 6, 1956.

[Title of District Court and Cause.]

AMENDED NOTICE OF APPEAL

Oriental Foods, Inc., defendant in the above-entitled action, hereby appeals to the United States Court of Appeals for the Ninth Circuit from paragraphs 1, 2, 3, 5, 7, 8, 9, and 10 of the judgment

docketed and entered January 11, 1956, in the above-entitled action.

Dated: March 5, 1956.

HARRIS, KIECH, FOSTER & HARRIS,
FORD HARRIS, JR.,
WALTON EUGENE TINSLEY,
/s/ By FORD HARRIS, JR.,
Attorneys for Defendant. [169]

Affidavit of Service by Mail Attached. [170]

[Endorsed]: Filed March 6, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Chun King Sales, Inc., and Jeno F. Paulucci, plaintiffs, hereby appeal to the United States Court of Appeals for the ninth circuit from that portion of the judgment which denies relief for unfair competition including paragraphs 4 and 6 of the judgment docketed and entered on January 11, 1956, in the above-entitled action.

Dated: March 6, 1956.

CHUN KING SALES, INC., and JENO F. PAULUCCI,
/s/ By ROBERT DOUGLAS LYON,
Attorney for Plaintiffs. [172]

Affidavit of Service by Mail Attached. [173]

[Endorsed]: Filed March 6, 1956.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 183, inclusive, contain the original

Complaint;

Answer and Counterclaim;

Plaintiffs' Interrogatories;

Answer to Counterclaim;

Notice of Hearing of Objections to Certain Interrogatories;

Motion to Compel Deponent to Produce Certain Documents and to Answer Certain Oral Interrogatories;

Defendant's Further Answer to Plaintiffs' Interrogatories;

Defendant's Request for Admissions;

Opinion;

Findings of Fact, Conclusions of Law and Judgment;

Motion to Amend Findings of Fact;

Notice of Appeal;

Motion for Stay of Injunction, etc., Pending Appeal;

Order Staying Injunction and Fixing Bond;

Amended Notice of Appeal;

Designation of Record on Appeal by Appellant Oriental Foods, Inc.;

Statement of Points on Appeal;

which, together with a full, true and correct copy of the Minutes of the Court for February 13, 1956; 2 volumes of reporter's transcript of proceedings; and plaintiffs' exhibits, 1, 2, 3, 3A, 5, 5A, 6, 6A, 7, 7A, 8, 8A, 9, 9A, 10, 10A, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21A to 21G, inclusive, 22, 23, 24, 25, 26, 27, 28, 29, 30, 34, 36, 37, 38, 39, 40, 41F, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57 and defendant's exhibits A, B, C, D, F to S, inclusive, T, U, V, W, X, X1, X2, X3, X4, Y, Z, AA, AB, AC, AD, AE-1, AE-2, AF, AG, AH, AI, AJ, AK, AL-1, AL-2, AM-1, AM-2, AM-3, all in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above case.

I further certify that my fees for preparing the foregoing record amount to $2.00, which sum has been paid by appellant.

Witness my hand and the seal of the said District Court this 18th day of April, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk.

/s/ By CHARLES E. JONES,
Deputy.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 10, inclusive, contain the original

Notice of Appeal;

Designation of the Portions of Record on Appeal;

Statement of Points on Appeal;

all in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit in the above case.

I further certify that my fees for preparing the foregoing record amount to $2.00, which sum has been paid by appellant.

Witness my hand and the seal of the said District Court this 18th day of April, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk.

/s/ By CHARLES E. JONES,
Deputy.

In the United States District Court, Southern District of California, Central Division

No. 17,882-Y Civil

CHUN KING SALES, INC., and JENO F. PAULUCCI, Plaintiffs,

vs.

ORIENTAL FOODS, INC., Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Tuesday, November 22, 1955. [1*]

Honorable Leon R. Yankwich, Judge presiding.

Appearances: For the Plaintiffs: Lyon & Lyon, by Lewis E. Lyon, Esq., and R. Douglas Lyon, Esq., 811 West 7th Street, Los Angeles 17, California; and Williamson, Schroeder, Adams & Meyers, by Everett J. Schroeder, Esq., 950 Pillsbury Building, Minneapolis 2, Minnesota. For the Defendant: Harris, Kiech, Foster & Harris, by Ford Harris, Jr., Esq., and Walton Eugene Tinsley, Esq., 417 South Hill Street, Los Angeles 13, California. [2]

Tuesday, November 22, 1955. 10:00 A.M.

The Clerk: 17,882-Y, Chun King Sales, Inc., et al., v. Oriental Foods, Inc. Lyon & Lyon, by Lewis E. Lyon and R. Douglas Lyon for the plaintiffs, and

---

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

associated with them is Mr. Everett J. Schroeder, out of town counsel. For the defendant is Harris, Kiech, Foster & Harris by Mr. Ford Harris, Jr., and Mr. Walton E. Tinsley.

The Court: All right, gentlemen, you are ready for trial?

Mr. Lewis E. Lyon: Yes, your Honor, we are ready. [3]

* * * * *

The Court: The only thing I want you to state to me is this: I have read the pleadings, I have read the memoranda, even the trial memoranda filed by the defendant on the 17th. I am familiar with the issues. The one point I want you to state is whether you rely on all three of the claims, or whether you rely only on one. Of course, it is customary to allege general infringement, but, as you know, we always require counsel for the plaintiffs to state whether he relies [4] on all, or one in particular, which simplifies issues.

Mr. Lewis E. Lyon: Yes, your Honor, and we are in this case relying upon claim 1 of the patent in suit.

The Court: Claim 1. Now, that answers the question. Counsel also raise the point in their memorandum about the matter, so that answers the question.

Mr. Lewis E. Lyon: Your Honor, at this time I would like to offer in evidence a printed copy of the patent No. 2,679,281 as Exhibit 1. It is the patent in suit.

The Court: Will you furnish me with a loose copy?

Mr. Lewis E. Lyon: Yes.

The Court: You know, I always like to have a loose copy so that I will not have to take the one which is either an exhibit, or an attachment to the complaint.

Mr. Lewis E. Lyon: Here is a copy for the court.

(The document was handed to the court.)

Mr. Lewis E. Lyon: Your Honor has already determined, as has been made evident to us, that you realize this is an action for patent infringement and for unfair trade practices.

We are directing our claim of infringement to claim 1 of the Paulucci patent, No. 2,679,281, Exhibit 1. [5]

[See Book of Exhibits.]

* * * * *

Now, when we get into the matter of the patent in suit, I don't desire to belabor a long opening statement to your Honor, because I know that you will want to hear the evidence, and not what I think about it.

The Court: That is right.

Mr. Lewis E. Lyon: But I want to make you cognizant of the issues, as I see them. And in this case you have what is known as the divided or double can pack, which is the subject of the patent in suit, and the manner in which those cans are tied together so as to make a retail package,—a retail package that will stay together.

Now, the evidence will show that the parties have

been seeking to perfect a method of so selling this product since 1949 and earlier. [7]

The evidence will show that the plaintiff, Chun King, put out some packages in 1949 of a divided pack, taped together.

It will show that that was unsuccessful, that the packages came apart, to the extent that each one of their salesmen over the country was equipped with rolls of tape of the different colors used on the different cans, and he went from market to market and retaped the cans as they came apart, to keep them a salable product, to the extent that they finally stopped it and then decided, well, now, maybe we can do something with this double pack idea by soldering the cans together. So they soldered them together, and that was a very unsuccessful attempt, because soldering resulted in corrosion of the cans, and was very expensive, as well as being, you might say, bad to the point of being unsanitary.

Then Mr. Paulucci discovered, at the time plaintiff's plant was moved in Duluth from one location to another, the method of the patent in suit, which involves the use of a flexible tape, which is applied to the cans under tension, to the extent that it stretches the tape, so that that tape does not just lie over the flanges of the can, but it follows the contour of the flanges because of the stretch of the tape and the tension, as it is applied, and also goes down and grips the can on each side of the flanges. That was an application of the tape in very material tension, so that [8] you stretched the tape to produce this type of wrapping, which is then very

secure, and relatively inexpensive, as compared to other methods.

The defendants also testified that they tried in 1949, or thereabouts, to use a method, and they testified that they tried hand taping cans under a certain method, but that that was unsatisfactory because it was too slow and economically bad, so they couldn't do it. [9]

* * * * *

Mr. Harris: Yes, your Honor, of course. But my point is simply that the plaintiff has not stated what, if anything, they claim is the invention of this patent.

The Court: The invention is simple.

Mr. Harris: Yes, sir.

The Court: It is a method of—not the idea of tying cans together, but an original method of taping them. And [12] that, as I said early in my career as a federal judge, may be a humble invention, but an invention may lie in a very simple and humble thing. I said that probably in the most successful case in recent years, and that was in the zipper case. [13]

* * * * *

The Court: All right. Now, let us ask this question: As the patent does not relate to the machine, or to the tools, rather, by which they are made, wherein does the need for [16] the demonstration arise?

Mr. Lewis E. Lyon: The need for it arises, your Honor, from the fact that through observation of the machine and its operation, you can observe the

carrying out, and demonstrating the machine proves the carrying out of the method of claim 1 of the patent in suit, Exhibit 1.

The Court: This is not a process patent.

Mr. Lewis E. Lyon: Yes, claim 1 is a process patent, your Honor.

The Court: It is a method patent, not a process patent.

Mr. Lewis E. Lyon: A process or method patent. One is the same as the other.

The Court: So long as you are going back in our own literature, let's get back to some of the cases. Let's take the Joyce Shoe cases,——

Mr. Lewis E. Lyon: Yes, your Honor.

The Court: ——of which I had several. Now, that was a method patent.

Mr. Lewis E. Lyon: That is right.

The Court: I held that the claims there were limited to a type of a platform shoe, because platform shoes were old in the art,——

Mr. Lewis E. Lyon: Yes, your Honor.

The Court: ——going back to the Chinese, hundreds of years. The problem before the court in those two cases [17] was whether a different kind of platform shoe, where height was secured in a different manner, infringed. I held that it didn't infringe.

Mr. Lewis E. Lyon: Of course, that was an article patent, your Honor, an article patent that dealt with the shoe.

The Court: But the method was of encasing the sole. Joyce wanted, of course, to extend the scope

of the patent, and he claimed all platform shoes. I held that all he had was a method to secure additional height by encasing a sole in one piece, and that anyone who achieved that by adding three pieces to a heel, securing the same results, did not violate the patent.

How could the method of manufacture bear upon the matter? It is the end, the result, that is patented. The manner in which they make them is not material. Supposing they did it by hand?

Mr. Lewis E. Lyon: That might very well be done. But, however, the way that they are doing it is by machine, and as I pointed out to your Honor before, the patent in suit deals with a method of tying these two cans together.

The Court: Not in the process of manufacture. It is the way they result, that they have tied them.

Mr. Lewis E. Lyon: No, your Honor. It is the steps of actually tying the two cans together.

The Court: "The method of securing two cans together, [18] said cans having beaded ends protruding beyond their side walls, comprising" and so forth.

Mr. Lewis E. Lyon: Yes.

The Court: ——"aligning said cans in end-to-end relationship."

Mr. Lewis E. Lyon: Yes, "aligning said cans in end-to-end relationship."

The Court: The way to determine it is by just looking at them and seeing them,——

Mr. Lewis E. Lyon: No.

The Court: ——whether they are tied together,

not the way they put them together on the machine.

Mr. Lewis E. Lyon: No, your Honor. This patent is to the physical steps of performing this tying together operation, and, certainly, it is our position that you can see that the end result is the same, but it is the proof of the carrying out of the particular steps of the method which constitutes the infringement.

The Court: Just a minute.

Mr. Lewis E. Lyon: As I told your Honor, the material part of that is using a stretchable tape, and putting that tape under tension, so that that tape stretches as it is applied, and the cans are rolled, so it will adhere around the beads and to the side walls of the can, so that you get a secure product. [19]

Now, you can tell from the product, certainly, that the tape is applied under tension, when you get a certain type of result, but you cannot determine, without viewing the machine and the operation, as to whether or not the steps of rolling the cans, the steps of applying tension to them during rolling, and the steps——

The Court: Rolling is what you call in the claim rotating?

Mr. Lewis E. Lyon: Rotating, yes; rotating the cans, and that is done in the machine. [20]

* * * * *

JENO FRANCISCO PAULUCCI

called as a witness on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

(Testimony of Jeno Francisco Paulucci.)

The Clerk: What is your full name?

The Witness: Jeno Francisco Paulucci.

The Clerk: How do you spell your first name?

The Witness: J-e-n-o.

The Clerk: And F-r-a-n-c-i-s-c-o? [23]

The Witness: Yes.

The Clerk: And the last name is?

The Witness: P-a-u-l-u-c-c-i.

Direct Examination

Q. (By Mr. Lewis E. Lyon): What is your residence, Mr. Paulucci?

A. 6 Minneapolis Avenue, Duluth, Minnesota.

Q. What is your occupation?

A. I am president of Chun King Sales, Incorporated.

Q. When was that Chun King Sales, Incorporated, organized? A. In May of 1947.

Q. And what business is the Chun King Sales, Incorporated, engaged in?

A. The processing, packing, and selling of oriental American foods.

Q. How long have they been engaged in that business?

A. Since incorporation, May, 1947.

Q. What particular products do they put out,—do you put out?

A. Well, it is quite an assortment of canned and also frozen American oriental foods under the Frozen Food Corporation.

(Testimony of Jeno Francisco Paulucci.)

Q. Does that include chicken chow mein, mushroom chow [24] mein, beef chop suey?

A. It does.

Q. How long have you been putting out those products?

A. Are you referring to those specific products there?

Q. No, I am referring to products of that type.

A. Since approximately—the chicken chow mein we started packing in June of 1947. The mushroom chow mein, that was the divider pack, in June of 1954; and the beef chop suey was approximately in January of 1948, I believe.

Q. You referred to the divider pack. What do you mean by that?

A. The divider pack is the products that we first started in selling in January of 1954, which we call our Cantonese line, because the divider pack that we refer to is cooking the vegetables separately from the sauce and the meat, and then taping the can of sauce and meat, if it is a meat or chicken product, onto the can of vegetables, similar to what you have there in front of you.

Q. Just so that the record may illustrate your testimony better, I hand you a can and ask you if this is what you refer to as a divider pack?

A. It is.

Q. And you state now that this divider pack is formed of what,—two cans?

A. Yes, sir. [25]

Q. You stated that the vegetables and the sauce

(Testimony of Jeno Francisco Paulucci.)

were separated. Now, with that can in front of you, and referring to the top and the bottom can, will you just make the record more clear on that?

A. The bottom can contains the vegetables, such as bean sprouts, celery, mushrooms, onions, bamboo shoots, water chestnuts, pimientos, with water. That is in the bottom can. That is cooked separately, requiring only a few minutes.

Q. And the can is sealed after that?

A. The vegetables are mixed together, they are slightly blanched, and put into the can, it is filled with water, it is sealed. It is cooked in our retorts, and it is then cooled, and then labeled.

The top can, and in this instance the beef chop suey, which is the sauce and the meat, is cooked separately. The sauce and meat is allowed to simmer for a long time in order to get the true flavor. It is then filled into the can, it is sealed, it is retorted, it is cooled, it is labeled.

Then the two cans are taped together, so that it is one unit, so to speak.

Q. And sold as a unit?

A. And sold as a unit, yes, sir.

Mr. Lewis E. Lyon: To illustrate the witness' testimony, I will ask that this particular can be marked Exhibit 3, and [26] be received in evidence in that manner.

The Court: It may be received.

(The can referred to was marked Plaintiffs' Exhibit 3 in evidence.)

(Testimony of Jeno Francisco Paulucci.)

The Court: Is that filled with the product, or is it merely a sample?

The Clerk: It is filled with the product.

Mr. Lewis E. Lyon: I would like to ask that that be marked Exhibit 3-A, instead of 3.

The Clerk: Why the "A," Mr. Lyon?

Mr. Lewis E. Lyon: Because, for the purpose of comparison, at a later time I will offer the corresponding can of the defendant, which I have here in my hand, as Exhibit 3-B.

The Court: Let's mark that 3, and the 3-A later.

Mr. Lewis E. Lyon: All right, we will mark it 3.

The Court: Yes, and then later the other one 3-A, because otherwise in the record they will be looking for 3.

The Clerk: A can of Chun King brand beef chop suey, a divider pack, is marked for identification and admitted in evidence as Plaintiffs' Exhibit No. 3.

Q. (By Mr. Lewis E. Lyon): You stated in your previous answer that the cans were taped together. When did you first endeavor, or when did you first tape cans together, Mr. Paulucci? [27]

A. Approximately May of 1949.

Q. What was your method of taping at that time?

A. We would take the tape and loosen it from the dispenser and roll the cans into the tape, and then tack the end on to the other end of the circumference of the bead.

(Testimony of Jeno Francisco Paulucci.)

Q. You are the patentee, the inventor of the patent in suit, Exhibit 1, are you not?

A. I am.

Q. Now, when did you conceive of the method defined in that patent?

A. Around June or July of 1951.

Q. How do you fix that date?

A. Well, because it was—there were two dates—I mean, two reasons why I can fix that date. One is that it was while we were moving the plant from Lake Avenue to 200 North 50th Avenue West, and the other one was because of the fact that we had to terminate soldering the cans of rice alongside the can of chop suey because of numerous complaints and returns.

Q. All right. Now, you say you conceived the method of the patent in suit during the time that you were moving. Did that method differ from the method you state that you had been using in 1949?

A. Yes, sir.

Q. Did you encounter any problems with the method that [28] you were using in 1949?

A. Yes, sir.

Q. What were those problems?

A. The cans would come apart, the tape would ruffle. That's about it.

Q. What did you do in endeavoring to keep the product on the market with that first hand method?

A. Well, we would—those that would come apart in the plant prior to shipping, that we knew, we would try to retape. Those that came apart on

(Testimony of Jeno Francisco Paulucci.)

the shelves or in transit in the cases from Duluth to the various places we were shipping them to, we would have our brokers and our salesmen—we had a few salesmen. In fact, at that time I think we only had one or two, but later on we had a few more, and we would send them tape, the brokers or the salesmen, and a lot of times they would take three different colors of tape, and they would go into the retail store and retape the cans on the shelves which had come apart, or if a grocer or wholesalers or someone had complained, he would go into their warehouse stock and see if any were apart. But that was the exception to the rule. It was mostly in the stores. [29]

* * * * *

Q. Then you went to the method that you say you conceived in July of 1951,—June or July of 1951; is that correct? A. That is correct.

Q. Now, after you conceived that, namely, in June or July of 1951, what did you do? Did you put it into use at all? A. Yes, sir.

Q. And when?

A. Well, it was after we moved into the new plant.

Q. When did you move into the new plant?

A. We started moving in July and into August, so it would be the latter part of August of 1951, approximately, that we started.

Q. When were you in production in your new plant?

(Testimony of Jeno Francisco Paulucci.)

A. Either the latter part of August, '51, or the early part of September of '51.

Q. Now, immediately on going into production in the new plant, did you put this new method into operation? A. Yes, sir.

Q. Will you describe to the court how this new method [31] differed from the old method?

A. Yes, sir. Instead of taking the tape and tabbing it on to the bead of the can, and then loosening the tape and rotating it, or, I should say, rolling the can into the tape and then tabbing it, instead we took the tape and just took out enough into a trough,—we took the cans and put the cans into a trough and took out enough of the tape and tabbed it on to the cans, and rotated the cans so that it created a tension on the tape, so that the tape would stretch and go over the contours of the bead, and on to the side walls of the can, and in such a way that it would make practically a weld of the two cans.

Q. Taking Exhibit 3, will you point out to the court what you mean by practically making a weld of the two cans together?

A. Well, by pulling the tape,——

The Court: Go ahead. Just repeat it, and it is up to the young lady there. I can see what you are doing.

The Witness: (Continuing) ——and then by tabbing it on here, and then by pulling this slowly so that it stretches the tape, it goes over the contour of the beads—here are the beads—and on to the

(Testimony of Jeno Francisco Paulucci.)

side walls of the cans, all around here (indicating), so that when it is completed and you tab off, as they have done here, the end, you have practically a weld, so that no matter if the beads are greasy, no matter if [32] the cans are heavy, it will not pull apart, and if it does, it would be just one in a million, I would say.

The Court: In other words, it overcomes the flaw resulting from the difference in the pull——

The Witness: That is correct.

The Court: ——caused by different weights, under the law of mechanics, is that correct? I mean, the difficulty you had before was because of the difference in the weight of the two cans, and that is why you said they didn't keep together?

The Witness: Not only that, but——

The Court: But the greasiness?

The Witness: ——but the grease on the beads, as well as the weight.

The Court: I see. All right.

Q. (By Mr. Lewis E. Lyon): Is it necessary now in your business of the sale and distribution of this divider pack, utilizing this new method, to supply your sales representatives with the tape and go out and tape the cans back together again in the markets? A. No, sir.

Q. You brought out the so-called divider pack first in what size or style of can, Mr. Paulucci?

A. Only in one style of can.

Q. Which was that? [33]

A. By the divider pack, Mr. Lyon, you are re-

(Testimony of Jeno Francisco Paulucci.)

ferring to the sauce and vegetables separate, are you not?

Q. Well, that is what you referred to?

A. Yes, sir.

Q. Maybe I should not have used the word "divider," and maybe I should have used the term of where you connected your noodles to your chow mein in the two cans; is that correct?

A. Yes, that is what we would refer to as a 2-can pack, or a 2-in-1 pack.

Q. As a 2-can pack or a 2-in-1 pack. Now, did the 2-in-1 pack precede the divider pack?

A. Yes, sir.

Q. When did you bring out the 2-in-1 pack?

A. The pack of noodles over the can of chow mein or chop suey was brought out in May of 1949.

Q. In May of 1949. Now, you have used a term, and we ought perhaps to get it straightened out in the record. You said "chop suey or chow mein." What determines whether it is chop suey or chow mein?

A. Well, chow mein, as I understand it, is the melange or stew of product which is served over noodles. The chop suey is a melange or stew of product which is served either with rice or over rice.

Q. So that the only difference is which you put it over, [34] whether it is rice or noodles, as to whether it is chop suey or chow mein; is that correct? A. To my knowledge, yes, sir.

Q. Now, you brought out this chow mein, I mean

(Testimony of Jeno Francisco Paulucci.)

this 2-in-1 pack, in 1949. When did you adopt the form of advertising illustrated by Exhibit 2, and by that form of advertising, Mr. Paulucci, I am referring to the little cartoon figures which are shown in that advertisement.

Mr. Harris: That is objected to, if the court please, as no foundation laid of any kind.

The Clerk: That is Plaintiff's Exhibit No. 2.

The Court: He is asking for the foundation. He asked him when he adopted it. Then he will come to the use of it. Overruled.

The Witness: I believe it was around August or September of—just wait. I get my years mixed a little bit—August or September, of 1953.

Q. (By Mr. Lewis E. Lyon): What did you do after you adopted that particular method of advertising? Did you put it in use?

A. Yes, we incorporated it in all—I wouldn't say all, but the majority of our national advertising, wherever it was in print. I don't mean TV, of course, but on the print. Anything that went into magazines or newspapers, and then we incorporated it on our labels for the new divider pack, [35] for which the art work was being made around November of 1953.

Q. Now, you have had before you, and we have referred to Exhibit 2, for identification. What is Exhibit 2, for identification?

A. It is a copy of the Life ad that we ran in November of '53.

Q. Was that the November 2, 1953 issue?

(Testimony of Jeno Francisco Paulucci.)

A. I believe it was November 2, 1953, yes, sir.

Mr. Lewis E. Lyon: I will offer in evidence at this time Exhibit 2, for identification, as Exhibit 2, and ask that it be so marked.

The Court: It may be received.

(The document heretofore marked Plaintiffs' Exhibit 2 was received in evidence.)

Q. (By Mr. Lewis E. Lyon): Now, Exhibit 2 contains on the left-hand side a panel. Will you define the function of that panel, that little panel of cartoon characters?

A. Mr. Lyon, the reasoning behind it, first, was that our products, our Chun King products, sort of fit many various uses other than—well, beef stew, you serve maybe for lunch or dinner, whereas chow mein we feel is a sort of a dish that can be served with a certain amount of glamour at practically any time.

So that we felt we could broaden the over-all acceptance [36] of our products by the homemaker if we could in our advertising, as well as on our labels, show her the various different uses, and not just for dinner or lunch. So that is why we started out this showing of the various cartoons, showing her that she could serve it with a party or a lunch.

Well, this little jingle that we have here describes it:

"It's a dinner, a brunch
"A party, a lunch
"A banquet at seven
"A bite at eleven

(Testimony of Jeno Francisco Paulucci.)

"A bridge table treat
"A snack you can't beat.
"A sparkling buffet
"A great TV tray
"Chow mein by Chun King
"Mm-m good, 'just the thing.'"

In other words, we were saying that Chun King was just the thing for any occasion you could practically name, and, therefore, we thought we could broaden the over-all acceptance of our products through this media of advertising, on our advertising, plus showing it on our labels, as long as our products were of a quality, and that it would result in repeat business and that we would see the broadening of our over-all business. [37]

Q. Now, did you actually adopt that method of showing the manner of use of your product on your cans, on the labels that were applied to your cans?

A. Yes, sir, we did it on the divider pack which you are showing me here now.

Q. When did you first do that?

A. The art work was in process approximately in November of 1953. We started selling the products in January of 1954.

Q. With the label as illustrated by Exhibit 3; is that correct? A. That is correct.

Q. What acceptance has that label had?

Mr. Harris: That is objected to as calling for a conclusion of the witness, and no foundation laid.

Mr. Lewis E. Lyon: I think, as president of the corporation, he has the best knowledge.

(Testimony of Jeno Francisco Paulucci.)

The Court: I think the question is a little too broad.

Mr. Lewis E. Lyon: All right. I will ask him first:

Q. Do you know what acceptance that label has had? A. Yes, sir.

The Court: Unless he actually calls on the trade, he can tell by volume of business whether his business increased or not, or whether he has heard from customers as to what the label has done, or something like that, but a broad question [38] like that might bring in almost anything.

Q. (By Mr. Lewis E. Lyon): To what end of the business do you particularly devote your time, Mr. Paulucci, to sales or production?

A. Sales, and administration.

Q. Has this label, this type of merchandising that you have developed here, received any particular recognition? And by that I mean this particular label. Just answer "Yes" or "No."

A. Yes.

Mr. Harris: That is objected to, if the court please, as to what counsel means by recognition. It is wholly indefinite, and calls for a conclusion anyway.

The Court: I think it is permissible to show acceptance and recognition in the trade, but not by means of a conclusion. Unless the man is on the road, all he can tell is whether his business has increased, or there is a greater demand for cans. He is an office man.

(Testimony of Jeno Francisco Paulucci.)

Mr. Lewis E. Lyon: Your Honor, this particular can, it so happens—I don't like to lead or instruct, but this particular label has received national recognition from a national organization, and it is not the trade acceptance alone that I am after. So I am asking him one question: Has it received national recognition?

The Court: If you are trying to show that it has been [39] given a medal, or praised, or something like that, then, of course, I will allow the question, but as it is, we could not tell. That is why, gentlemen, I say sometimes that a leading question is in itself not objectionable, if its object is merely to point to the witness what you are seeking.

Now, in that particular case if what you mean by "recognition" is like receiving an award, or something like that, then I will allow it to be asked, if it is to be followed by a specific instance.

Mr. Lewis E. Lyon: Yes, your Honor, I was going to follow it by a specific instance.

The Court: All right. Go ahead.

Q. (By Mr. Lewis E. Lyon): Your answer was? A. I don't remember the question.

The Court: Read the question.

Q. (By Mr. Lewis E. Lyon): The question was: Has this label received particular recognition?

A. Yes, sir.

Q. How?

A. In one periodical in particular, "The Modern Packaging," I think it is called, and by other trade papers.

(Testimony of Jeno Francisco Paulucci.)

Mr. Harris: If the court please, that is not the best evidence. These trade papers he is referring to would be the best evidence of these facts.

The Court: Of course, this merely identifies it. After [40] that the trade papers themselves would be the best evidence of what the recognition was.

Mr. Lewis E. Lyon: Certainly.

The Court: If it is an award, then you have to have some official action of the award.

Mr. Lewis E. Lyon: I have gotten a little ahead of myself.

The Court: All right.

Mr. Lewis E. Lyon: I will come back to that.

The Court: All right. Then don't leave the question up in the air. You are withdrawing the question?

Mr. Lewis E. Lyon: There is no question before the witness. He said, "Yes, it has."

The Court: All right. Then we will leave it there. Then we won't follow it up.

Mr. Schroeder: I believe I have it, your Honor.

The Court: All right.

Q. (By Mr. Lewis E. Lyon): I hand you, Mr. Paulucci, a scrapbook, which includes an issue of "Modern Packaging," and I will ask you if you can identify both the scrapbook and the magazine referred to, "Modern Packaging"?

A. Yes.

Mr. Lewis E. Lyon: I will ask that the scrapbook just identified by the witness be marked as Exhibit 4, for identification, and also, that the pub-

(Testimony of Jeno Francisco Paulucci.)

lication "Modern [41] Packaging" appearing in that scrapbook be marked as Exhibit 5, for identification.

The Court: All right.

(The documents referred to were marked Plaintiffs' Exhibit No. 4 and Plaintiffs' Exhibit No. 5, respectively, for identification.)

Q. (By Mr. Lewis E. Lyon): You say you can identify this Exhibit 4. What is this Exhibit 4 that I have referred to as a scrapbook, Mr. Paulucci?

Mr. Harris: Excuse me. Is the whole scrapbook marked?

The Court: It is marked for identification, and then as we take individual things—this is our system, Mr. Harris, and you have tried cases here before so that you know when we have a large document, for instance, sometimes you have offered prior art in one book, and we have marked it for identification, and then as we take different things from it, we give them separate numbers. That is the method we follow. So the entire scrapbook is given a number for identification, and as we draw things from it, we give them numbers. So then we now call this No. 5, and we know they all come from Exhibit 4.

Q. (By Mr. Lewis E. Lyon): The question before you is: What is this Exhibit 4?

A. This is one of our scrapbooks.

Q. What do you mean by "one of our scrapbooks"?

A. Well, we have kept a scrapbook from the

(Testimony of Jeno Francisco Paulucci.)

time we [42] started our business on various events we think worth keeping a record of.

Q. Are they publicity releases, or what? What is contained in such a scrapbook?

A. Oh, publicity releases, news articles, photographs, and anything that shows the progress and growth of our company in a pictorial sense and in a worded sense.

Q. Who keeps this scrapbook?

A. My secretary does.

Q. Under your supervision? A. Yes, sir.

Q. Is it kept periodically, or continuously?

A. Yes, sir.

Q. This particular scrapbook, Exhibit 4, covers what period of time?

A. From 1954 through 1955.

Q. Now, on one of the pages of this book I find Exhibit 5, which is the periodical "Modern Packaging." Are you acquainted with that periodical?

A. Yes, I am.

Q. That periodical deals with what industry, if you know?

A. Well, the packaging industry, actually.

Q. Is that a magazine of national circulation, to your knowledge? [43] A. Yes, sir.

Q. Did you receive this copy, Exhibit 5, at the time it was published? A. Yes, sir.

Q. Where? Where did you receive it?

A. In Duluth, in my office.

Q. Now, this magazine was published, according to its date, in October, 1955. Do you have any

(Testimony of Jeno Francisco Paulucci.)

recollection as to whether that date is correct or not? A. Yes, that is correct.

Q. Where did the data which is included in this article originate, do you know?

A. Yes, from information that was asked from us from Duluth, as well as our representative in New York on public relations.

Q. Now, I notice a label on page 131 of Exhibit 5. Whose label is that?

A. That is one of our Chun King divider pack labels.

Q. Who supplied that label?

A. We did, at their request.

Q. You mean you supplied them samples of your labels to be included in their publication?

A. That is correct.

Q. And who actually pasted the label in the publication? A. They did. [44]

Mr. Lewis E. Lyon: As long as this label has been referred to in this particular publication, and identified, I will ask that it be marked Exhibit 5-A, as a part of Exhibit 5.

The Clerk: A label contained on page 131 of Plaintiffs' Exhibit No. 5 is marked as Plaintiffs' Exhibit 5-A, for identification.

(The document referred to was marked Plaintiffs' Exhibit 5-A, for identification.) [45]

* * * * *

The Clerk: You ruled that these were admitted in evidence, [46] your Honor, 5 and 5-A?

(Testimony of Jeno Francisco Paulucci.)

The Court: Yes, they may be received in evidence; just the particular publications.

Mr. Harris: Just the particular publications are all that have been received?

The Court: Yes, that is right.

The Clerk: 5 and 5-A admitted in evidence.

(The documents heretofore marked Plaintiffs' Exhibits 5 and 5-A were received in evidence.) [47]

* * * * *

Q. (By Mr. Lewis E. Lyon): Start in with Exhibit 6 that you have in your hand.

A. Exhibit 6 is a can, a three-pound can of beef chop suey, which is the melange or stew, as we call it, all cooked together, gravy and vegetables and sauce and meat all in one can.

Exhibit 7 is the Chun King three-pound can of chicken chow mein without noodles, which, again, is a melange or stew of vegetables, sauce, and in this instance, chicken, all cooked together.

Exhibit 8 is a Chun King three-pound can of meatless chow mein without noodles, which, again, is the melange or stew of vegetables and sauce, all cooked together.

Q. Now, what is the characteristic background coloring of Exhibit 7?

A. Exhibit 7, the background coloring——

Q. 6, I mean. Pardon me.

A. Excuse me. Exhibit 6 is a red background.

Q. All right.

Exhibit 7 is what?

(Testimony of Jeno Francisco Paulucci.)

A. Exhibit 7 is a yellow background.

Q. And what is Exhibit 8?

A. Exhibit 8 is a white background.

Mr. Lewis E. Lyon: Now, immediately below those cans, [49] as they were stacked, there are three cans, which I will draw your attention to now, which are marked Jan-U-Wine, and which I will ask be marked Exhibits 6-A, 7-A, and 8-A, respectively.

The Clerk: So marked.

(The items referred to were marked Plaintiffs' Exhibits 6-A, 7-A and 8-A, respectively, for identification.)

Mr. Lewis E. Lyon: I will point out at this time that the one I am asking be marked Exhibit 6-A is Exhibit 5 to the deposition of Mr. Hyun, taken on November 10, 1955, and was at that deposition identified as a defendant's product.

Exhibit 7-A is Exhibit 6 to the Hyun deposition of November 10, 1955.

Exhibit 8-A was not identified at that deposition.

The Court: Does it show by the printing? It is too far from me to see if it is a product of the defendant.

Mr. Lewis E. Lyon: Yes, it has Jan-U-Wine on it.

The Court: Then I think counsel will not dispute it.

Mr. Harris: I don't know. I have not seen it before. I will be glad to show it to my client.

The Court: Show it to him.

(Testimony of Jeno Francisco Paulucci.)

Mr. Lewis E. Lyon: That is Exhibit 8-A, for identification.

I might correspondingly ask for a stipulation with respect to Exhibits 6-A and 7-A. They were identified in the deposition, but I don't know that we will use the deposition. [50]

Mr. Harris: We will be glad to stipulate that this Exhibit 8-A, for identification, bears a label of the defendant. What is in the can we don't know.

The Court: Not that it bears a label. That stipulation does not go far enough. Is it a can of the type that is put out by the defendant? That is the question.

Mr. Harris: The defendant has sold cans of this size, with that type label on it, yes, sir.

The Court: I see. All right.

Mr. Harris: Now, what else does counsel want?

Mr. Lewis E. Lyon: Also as to 6-A and 7-A.

The Court: A similar stipulation.

Mr. Harris: The same stipulation as to Exhibits 6-A and 7-A.

The Court: All right. [51]

* * * * *

The Clerk: Plaintiffs' Exhibits 6, 7 and 8, and 6-A, 7-A and 8-A are admitted in evidence.

(The items referred to were marked Plaintiffs' Exhibits 6, 7 and 8, 6-A, 7-A and 8-A, respectively, and were received in evidence.)

Mr. Lewis E. Lyon: I will ask the defendant if he will stipulate that these three cans are also the product of the defendant.

(Testimony of Jeno Francisco Paulucci.)

Mr. Harris: No, sir, we shall not, because we can't tell who taped those cans together, or how many times they have been taped together. We can't stipulate anything about those cans.

Mr. Lewis E. Lyon: I am not worried about the taping thereon. Are those your labels?

Mr. Harris: If you so find. I don't know.

The Court: This is a good stopping point, gentlemen. [53] It is after 12:00 o'clock, and you have gotten a start. It may well be that after consulting your client you may be willing to stipulate. If you are going to offer any more——

Mr. Lewis E. Lyon: Yes, I will ask these three cans—if I may interrupt—that I asked for identification on be marked for identification.

The Court: They will be marked as the next three numbers.

The Clerk: That will be 9——

The Court: Give them an identification for the record, Mr. Lyon.

Mr. Lewis E. Lyon: The cans I am handing him are Exhibits 9-A, 3-A and 10-A, respectively.

The Court: All right. Then we will take our noon recess. [54]

* * * * *

Mr. Lewis E. Lyon: Your Honor, for the purpose of completing the record at the point that we left it as to these exhibits, 9-A, 10-A and 3-A, for identification, which are marked with the Jan-U-Wine name, and as to which I requested a stipulation of the defendant's counsel, I will ask: Are

(Testimony of Jeno Francisco Paulucci.)

you willing to stipulate those are your products?

Mr. Harris: We are willing to stipulate that the defendant has sold products in cans that size, with similar labels on them. I don't know that those particular cans are the product of the defendant.

The Court: All right. In the light of the presumption, under the law of the State of California, which applies, that there is always a presumption in favor of fair dealing, as to which the Supreme Court of California in a famous case, which has an odd name, the Onderdonk case, held was so strong that it compared with the presumption of innocence, in view of counsel's admission, I think it may be taken that they are their cans. Otherwise, somebody is parading under a different [56] name. So I will accept the stipulation, so far as it goes, and I will draw from it the inference unless counsel wants to contradict it later on.

Mr. Lewis E. Lyon: Thank you, your Honor. I will offer, therefore, at this time in evidence the cans heretofore marked Exhibit 9, Exhibit 9-A, Exhibit 10, Exhibit 10-A and Exhibit 3-A, all of which have heretofore been marked for identification under those respective designations.

Mr. Harris: If the court please, that is objected to on the ground that no foundation has been laid, because my information is that cans of this type have been sold by the defendant only subsequent to the filing of this action.

The Court: That does not make any difference. This is an equity action, where injunctive relief is

(Testimony of Jeno Francisco Paulucci.)

asked, and, therefore, under the new rules of procedure, which have the force of law, evidence may be received up to and including the date of the decree, and, under the new rules, which, of course, are not any different from what the rules were in equity, the court may receive testimony, and then, if necessary, order the complaint amended, and other supplemental pleadings are even unnecessary. That was always the rule in equity, and is now the rule everywhere. The objection is overruled.

(The items heretofore marked Plaintiffs' Exhibits 9, 9-A, 10, 10-A and 3-A, were received in evidence.) [57]

* * * * *

Mr. Lewis E. Lyon: Now, I have two more cans here of the defendant's product, and I will ask: Are you willing to stipulate that these cans——

Mr. Harris: The same stipulation, if the court please, and the same objection.

The Court: The objection is overruled. They may be received.

Mr. Lewis E. Lyon: I will ask that these two cans be marked. Exhibit 11 will be the chow mein-noodles and the mushroom chow mein double pack, and Exhibit 12 will be the combination of the chow mein-noodles and the beef chop suey.

Mr. Harris: The same stipulation on these two cans.

The Court All right.

Mr. Harris: No objection on these two.

The Court: All right. They may be received.

(Testimony of Jeno Francisco Paulucci.)

The Clerk: Plaintiffs' Exhibits 11 and 12 identified only, or admitted in evidence, Mr. Lyon?

Mr. Lewis E. Lyon: Offered in evidence and received.

The Clerk: Received in evidence. [59]

(The items referred to were marked Plaintiffs' Exhibits 11 and 12, and received in evidence.)

Mr. Lewis E. Lyon: Exhibit 13 is a dual pack of a one cent sale of chow mein-noodles and chicken chop suey.

The Clerk: Exhibit 13, combination dual pack of chow mein-noodles and chicken chop suey.

Mr. Lewis E. Lyon: Offered and received.

The Court: May be received.

(The item referred to was marked Plaintiffs' Exhibit 13, and received in evidence.)

Mr. Lewis E. Lyon: Exhibit 14 is the double pack of the one cent sale chow mein-noodles and beef chop suey, which is offered and received in evidence.

The Court: It may be received.

The Clerk: That is Plaintiffs' Exhibit No. 14.

(The item referred to was marked Plaintiffs' Exhibit 14, and received in evidence.)

Mr. Harris: May the record show, if the court please, that the defendant has produced the machine, in accordance with the plaintiffs' subpoena.

The Court: All right.

Mr. Harris: It is here in court.

The Court: Mr. Lyon wanted at this time, in

(Testimony of Jeno Francisco Paulucci.)

order to complete the record at this place, to proceed, as I understood him,—— [60]

Mr. Lewis E. Lyon: That is correct.

The Court: And then as soon as he has reached a stopping point, why, we will go on to that.

Mr. Harris: Yes, your Honor.

Mr. Lewis E. Lyon: Exhibit 15 is the double pack one cent sale of chow mein-noodles and vegetable chop suey of the defendant's, which is offered in evidence as Exhibit 15.

The Clerk: This is admitted in evidence, your Honor?

The Court: It may be received.

The Clerk: 15 in evidence.

(The item referred to was marked Plaintiffs' Exhibit 15, and received in evidence.)

Q. (By Mr. Lewis E. Lyon): I hand you, Mr. Paulucci, just to complete this phase two cans—wait a minute. I guess this one does not go with it—of product. Isn't there a third one of that same type? A. Yes, sir.

Q. I will put the six of them in front of you that I have, and will you see if it is in these six? I think there is a mistake here. Now, there should be another one. Just to complete this portion of the record, I will ask you if you can identify these five cans that have been placed before you?

A. Yes, sir.

Q. The five double cans? [61] A. Yes, sir.

Q. What are they, will you state?

A. Individually?

(Testimony of Jeno Francisco Paulucci.)

Q. Yes.

A. The one which is called the chow mein-noodles 2-in-1 offer, over the can of beef chop suey, is one of our most recent packs.

Q. When was that put out?

A. This was put out in 1955.

Q. What time?

A. I would say about—we first started packing them I think around April or May, 1955.

Mr. Lewis E. Lyon: I will ask this can be received in evidence as Plaintiffs' Exhibit next in order.

The Clerk: The next number coming up, Mr. Lyon, is No. 16.

The Court: It may be received.

The Clerk: 16 admitted in evidence.

(The item referred to was marked Plaintiffs' Exhibit 16, and received in evidence.)

Q. (By Mr. Lewis E. Lyon): Now, proceed with the next double can.

A. This, also, is one of my more recent packs of chow mein-noodles with the 2-in-1 combination offer, taped on to a can of meatless chow mein, which got on to the market, I [62] would say, around April or May of 1955.

Mr. Lewis E. Lyon: I would ask that this double pack be marked in evidence as Exhibit 17.

The Court: It may be received.

The Clerk: Exhibit 17 received in evidence on the order of the court is chow mein-noodles and meatless chow mein, a dual pack.

(Testimony of Jeno Francisco Paulucci.)

(The item referred to was marked Plaintiffs' Exhibit 17, and received in evidence.)

Q. (By Mr. Lewis E. Lyon): Is there a third of that same series? A. Yes, there is a third.

Q. Which one is missing?

A. Actually, there are two missing.

Q. Which are they?

A. The one which is the chow mein-noodles 2-in-1 combination offer, taped on to a can of subgum chicken-mushroom chow mein, which also got on to the market, I believe, around April or May of 1955.

Then there is a fourth one, which is a can of rice in a 2-in-1 offer, which is taped on to a can of beef chop suey, which also got on to the market approximately April or May of 1955.

Q. All right. Now, there are three other cans in front of you here. Can you identify these cans?

A. Yes. [63]

Q. One at a time.

A. The one here is the older label of chow mein-noodles 2-in-1 offer, which is taped on to a can of meatless chow mein, and I believe that with this 2-in-1 offer, this was entered on the market in the Fall or Winter of—may I refer to some notes?

Q. Certainly, at any time, as long as you exhibit the notes to counsel, if they desire to see them.

A. In late '52, 1952.

Q. All right. And this particular can that you had in your hand was the combination of the chow

(Testimony of Jeno Francisco Paulucci.)

mein-noodles with the meatless chow mein; is that correct? A. Yes.

Mr. Lewis E. Lyon: I will ask that be marked and received in evidence as Plaintiffs' Exhibit 18.

The Clerk: Chow mein-noodles, dual pack combined with meatless chow mein, Plaintiffs' Exhibit No. 18, identified and admitted in evidence.

(The item referred to was marked Plaintiffs' Exhibit 18, and received in evidence.)

Q. (By Mr. Lewis E. Lyon): Now, take the next one.

A. The next one is a can of chow mein-noodles, with the 2-in-1 combination offer, which is taped on to a can of our Chun King subgum chicken-mushroom chow mein, and this, too, was released on the market in the latter part of 1952.

Mr. Lewis E. Lyon: I will ask this dual pack, just [64] identified by the witness, be received in evidence as Exhibit 19.

The Court: It may be received.

The Clerk: Dual pack chow mein-noodles and subgum chicken-mushroom chow mein, admitted in evidence and identified as Exhibit 19.

(The item referred to was marked Plaintiffs' Exhibit 19, and received in evidence.)

Q. (By Mr. Lewis E. Lyon): Take the next dual cans.

A. This is a can of rice with our 2-in-1 combination offer, which is attached to a can of Chun King beef chop suey, and this, too, was released on the market in the latter part of 1952.

Mr. Lewis E. Lyon: I will ask that this dual pack, just identified by the witness, be marked and received in evidence as Exhibit 20.

The Courtff It may be received.

The Clerk: 20 in evidence.

(The item referred to was marked Plaintiffs' Exhibit 20, and received in evidence.) [65]

* * * * *

Mr. Lewis E. Lyon: I will call Mr. Kesterson, please.

Your Honor, for the purpose of the record, with respect to this machine it is not plaintiffs' desire to keep this machine in court any longer than necessary. I would like to have the machine identified, and its construction and operation established, and for the purpose of the record, I would like to have an order of the court permitting photographs of the machine to be taken and to be substituted in lieu of the original, so that the record will be complete as to the machine which is now in court.

Mr. Harris: No objection.

The Court: All right. That may be done.

JOHN W. KESTERSON

called as a witness by the plaintiffs under the provisions of Section 43(b) of the Federal Rules of Civil Procedure, and having been first duly sworn, was examined and testified as follows:

The Clerk: What is your full name?

The Witness: John W. Kesterson.

The Clerk: Will you spell your last name?

The Witness: K-e-s-t-e-r-s-o-n.

(Testimony of John W. Kesterson.)

Direct Examination

Q. (By Mr. Lewis E. Lyon): What is your occupation, Mr. Kesterson? [66]

A. Plant manager of Oriental Foods, Inc.

Q. I can't hear you.

A. I said plant manager of Oriental Foods, Inc.

* * * * *

Q. (By Mr. Lewis E. Lyon): How long have you been employed by the defendant?

A. Approximately ten years.

Q. Beginning when? [67]

A. I can't recall the exact date, but it was around the first of the year in 1946.

Q. Have you always occupied the position of plant manager? A. No, sir, I have not.

Q. What position did you have before you became plant manager? A. Before?

Q. Yes. A. I was assistant plant manager.

Q. And how long did you occupy that position?

A. I would say, roughly, three years.

Q. Was that all within the period of 1942 to date? A. 1946 to date.

Q. 1946 to date, Pardon me. Before 1946 were you employed by the defendant?

A. I was not.

Q. As assistant plant manager, what were your duties?

A. To assist the plant manager in carrying out his duties.

Q. And in that capacity, in so assisting the plant manager, what did you do?

(Testimony of John W. Kesterson.)

A. Carried out his orders.

Q. Well, were you in charge of the operation of the machinery? [68] A. Under him, yes.

Q. Were you in charge of the maintenance of the machinery?

A. Well, if his orders called for me to be, I would say yes.

Q. Did you have anything to do with the actual canning operation?

A. What do you mean, manually?

Q. Manually, or any other way.

A. Oh, yes, sir, I had.

The Court: Speak louder, so that we can all hear you, Mr. Kesterson.

The Witness: Yes, sir. Under his orders I would have had, yes.

Q. (By Mr. Lewis E. Lyon): Did you actually have charge of and supervise the operation of the cutting, retorting, and canning of vegetables?

A. I would say yes.

Q. Did you have charge of the labeling and packaging of the cans?

A. Well, not full charge; but charge, yes.

Q. You were completely familiar with all of those operations that were performed; is that correct? A. I would say yes.

Q. Were you at any time from 1946 to date out of the [69] employ of the defendant organization?

A. Yes, I was.

Q. For how long?

(Testimony of John W. Kesterson.)

A. I would say for a period of approximately nine or ten months.

Q. During what period of time? When was that?

A. That was in the latter part of '49 and '50, I believe.

Q. Who was the president of the organization in 1946? A. The president of the organization?

Q. Yes. Was that Mr. Hyun, Sr.?

A. Mr. Hyun, Sr.

Q. How long did he stay in that position?

A. Well, I suppose up to date.

Q. He is still the president of the organization?

A. As far as I know.

Q. Is he active at the present time?

A. No, I would say semi-active.

Q. What do you mean by semi-active?

A. Well, what I mean is—by that I would mean that he is not in the plant as much as he was formerly.

Q. He hasn't released his position as president to anyone, to your knowledge?

A. To my knowledge, no.

Q. There has been produced here a machine which is over [70] here on the table. Are you familiar with that machine?

A. Familiar with it? Yes, sir.

Q. Are you familiar with its operation?

A. Well, I would say yes.

Q. When did you first see that machine?

(Testimony of John W. Kesterson.)

A. Well, I couldn't give you an exact date, but I would say around June or July, of 1954.

Q. Under what circumstances did you first see that machine?

A. I don't quite get the question.

Q. Well, was the machine in the plant, or did somebody bring it in and show you the machine, and tell you about it, and tell you about its operation, or under what circumstances of that character did you first see the machine?

A. When I first saw the machine, it was already in the plant.

Q. I see. Now, was anyone there with it?

A. You mean, did someone——

Q. Bring it in? A. ——bring it in?

Q. Yes.

A. Well, it was in there when I first saw it, the first time.

Q. I see. Was anyone there with the machine when you saw it? [71]

A. You mean from the company, or from our company?

Q. From either your company, or from any outside source?

A. Well, yes, sir, I walked up to the machine with another man.

Q. And who was the other man?

A. Bob Spalty, S-p-a-l-t-y.

Q. And what was that man's—was he employed by the defendant? A. Yes, sir.

Q. In what capacity?

(Testimony of John W. Kesterson.)

A. He was plant manager at that time.

Q. For how long did he continue to occupy that position?

A. I would say for some two to three months.

Q. After this machine was delivered?

A. Yes, sir.

Q. Was there anybody else present besides you and the plant manager at the time you first saw this machine? A. No, sir, there was not.

Q. Did anyone explain the operation of this machine to you? A. No.

Q. Do you know where this machine came from?

A. I suppose the Dellenbarger Machine Company. I mean, that is as far as I know. I never saw any records of it. [72]

Q. Do you know who that machine company is?

A. I do not, sir.

Q. Who supplies tape for the machine?

A. The Minnesota Mining & Manufacturing Company right at the present time.

Q. When did you first obtain tape for that machine from Minnesota Mining & Manufacturing Company?

A. Well, I couldn't answer that, as to a date, because I wouldn't remember.

Q. Did you ever obtain tape and use it on that machine from any other source than Minnesota Mining & Manufacturing Company?

A. Not to my knowledge.

Q. Did Minnesota Mining & Manufacturing Company, to your knowledge, send representatives

(Testimony of John W. Kesterson.)

to your plant to show you how to operate that machine?

A. No, sir, not to show us how to operate it.

Q. Well, were they there when you did operate it?

A. Well, they have been—oh, they have been there when it was being operated.

Q. Did anyone from any other organization show you how to operate that machine?

A. To my knowledge, no one from any company showed it to me, how to operate the machine.

Q. Did they show to your immediate superior how to [73] operate that machine, to your knowledge? A. I couldn't answer that.

Q. You don't know? A. I wouldn't know.

Q. You learned how to operate it from the plant manager; is that correct?

A. No, sir, I did not.

Q. How did you learn how to operate it?

A. By just experimenting with it.

Q. All right. Now, how long a period of time did you experiment with it?

A. That is hard to answer, too. I wouldn't know.

Mr. Lewis E. Lyon: I don't suppose, your Honor, under the conditions that this machine was brought into court, unless it is for the purpose of identifying it so that a designation will show in the photograph, that there is any reason for marking the machine.

The Court: There isn't any reason for marking

(Testimony of John W. Kesterson.)

the machine. What do you mean? What kind of marking?

Mr. Lewis E. Lyon: I mean to tag it, so that it can be identified, and any identification tag would show in the photograph.

The Court: It may be done, but the printing on the photograph is so small unless you make a special printing of it that it probably would not show on it.

We can do, as we do with any object, tag it.

Mr. Lewis E. Lyon: I think it would be well to mark it for identification.

The Court: You know, we have had everything here, including a miniature oil digging outfit in this court.

Mr. Lewis E. Lyon: I think it would be well to mark it for identification as Plaintiffs' Exhibit 21.

The Court: The clerk can attach a tag to it, and he can print it large enough so that whoever takes the photograph may photograph the tag. [75]

* * * * *

Mr. Lewis E. Lyon: Now, I think, your Honor, if the witness could come over here.

The Court: I think we will all move over.

Mr. Lewis E. Lyon: Or if the witness would talk a little louder——

The Court: I don't think that would do. I think it would be well for us to move.

Mr. Lewis E. Lyon: And move the machine right up here?

The Court: Yes, move the machine. [76]

Just a minute. Why don't we ask Mrs. Zellner

(Testimony of John W. Kesterson.)

to move here, and I can sit back of the press table, and she can sit here.

The Clerk: The machine is marked as Plaintiffs' Exhibit 21, for identification.

(The machine referred to was marked Plaintiffs' Exhibit 21, for identification.)

Q. (By Mr. Lewis E. Lyon): Now, this is the machine produced by the defendant. Is this the machine you are familiar with?

A. That's right, sir.

Q. Is this the machine that has been operated by the defendant in taping two cans together?

A. Yes, sir.

Q. How long has it been so used?

A. Since about, roughly, around September, 1954.

The Court: Speak up louder so that we can all hear you. Will you read the last question and answer?

(Question and answer read.)

Q. (By Mr. Lewis E. Lyon): This machine includes a reel, on which I have my hand at the present time, upon which the roll of tape is mounted; is that correct? A. That is correct.

Q. And that tape is threaded upon that reel, around and underneath this roller, this silver roller on which I have my hand, and which I am spinning, and then up between this [77] longitudinal serrated roller, under the rubber roller, down under-

(Testimony of John W. Kesterson.)

neath the knife, and down on to the can; is that correct? A. No, sir.

The Court: Let him explain.

Q. (By Mr. Lewis E. Lyon): Where is it wrong?

A. It does not go down underneath the knife. It stops right here (indicating).

The Court: Now, what do you mean by "here"? "Here" does not mean anything in the record. Would you designate the place on the machine?

The Witness: Yes, I did, right here, between the roller and the knife.

The Court: Between the roller and the knife. All right.

Mr. Harris: I don't think the record is clear as to which roller the witness is speaking of.

The Court: I have tried to make him indicate.

The Witness: This top roller (indicating).

The Court: The top roller. All right.

Q. (By Mr. Lewis E. Lyon): I hand you a pack, and will ask you if this is the type of pack of the defendant which is taped on the machine in front of you? A. Yes, we have taped that type.

Q. That machine is set up so that it can carry two [78] rolls of tape, is it not? A. Yes, sir.

Q. And the purpose is to connect together three cans; is it not? A. That is right.

Mr. Lewis E. Lyon: Have we got those rolls of tape?

(The rolls were handed to counsel.)

Q. (By Mr. Lewis E. Lyon): Now, I am going to ask you, Mr. Kesterson, if you can take these

(Testimony of John W. Kesterson.)

two rolls of tape and put them on this machine, and take these three cans, which are not cans that are in evidence, take them apart, and demonstrate the operation of that machine?

Mr. Harris: That is objected to, if the court please, because these cans have already been taped, and that would not give an accurate illustration of a taping operation with cans that have not been taped previously.

Mr. Lewis E. Lyon: I told him to take the tape off of them.

Mr. Harris: But when he takes it off, it leaves the stickum on the can, and does not give a complete picture of the operation.

The Court: I agree that we should have cans in the virginal state, as it were.

Mr. Lewis E. Lyon: All right. Have we got such cans here? [79]

I will ask the defendant, because these are their own cans, not cans of our size, that they produce three such cans, your Honor.

The Court: Well, if you have them here.

Mr. Harris: We don't have these here, your Honor, I am sure. If counsel had told me this this morning, I could have had them here.

Mr. Lewis E. Lyon: For the purpose of illustrating the machine, and not as a demonstration, then, I will ask you to start out and thread these two pieces of tape into the machine.

The Court: You take them apart. Have they taken them apart?

(Testimony of John W. Kesterson.)

Mr. Lewis E. Lyon: No, they are easy enough to take apart.

The Court: Is that what you are speaking of?

Mr. Harris: What I am talking about, your Honor, is that cans once taped have some stickum left on from the tape, and the thing doesn't work right.

The Court: That isn't the point we are concerned with. What is involved here is the process.

Mr. Lewis E. Lyon: That is right, your Honor.

The Court: The process of putting them together, and that should not differ whether you use cans that have never been taped or cans that were once taped. [80]

Mr. Harris: I think the evidence will show it makes quite a bit of difference.

Mr. Lewis E. Lyon: All right. If that is so, the defendant can produce cans that have not been taped.

The Court: Let's allow that for demonstration, allowing for any margin of error for the fact that there are ingredients from prior taping. We will leave those out.

Mr. Lewis E. Lyon: Of course, it is understood that the tape that we are using is not the tape of the same color as was taken off from the cans, so it will show that the cans——

The Court: The main point is to have a demonstration.

Mr. Lewis E. Lyon: That is right, your Honor.

(Testimony of John W. Kesterson.)

The Court: All right, Mr. Kesterson. Oh, you are not through there?

Mr. Lewis E. Lyon: Let's take the other end. I would suggest on this you take the end that has not been taped.

Mr. Harris: May the record show that counsel has now taken the tape off of these cans, and there is still quite a bit of tape remaining on the cans.

The Court: Let's not try to have perfectionists just now, gentlemen, because we can't use up too much time in a simple demonstration. What we want to find out is an illustration of the manner in which the taping is done, so as to see its relation to the patent in suit.

The Witness: I believe this machine is set up for a [81] dual pack, so if it is, this won't fit in. I can't run this demonstration the way it is set.

Mr. Lewis E. Lyon: Well, he can't run it. This is a 220-motor, is it not?

The Court: What have we got?

The Witness: It is a 110-motor, but it has the wrong prong on it.

The Clerk: You need a converter for the plug, your Honor. It is a different type of plug.

The Court: Oh, we don't want to blow out all the fuses.

Mr. Lewis E. Lyon: That would not blow out the fuses. It just would not run until we get a converter. What it takes is a converter to convert this industrial plug to a 2-prong plug. I just sent my associate to get one.

(Testimony of John W. Kesterson.)

The Court: Where is he going to get it?

Mr. Lewis E. Lyon: I believe Enders Hardware, right down on Main Street.

The Witness: We can't run this now.

Mr. Lewis E. Lyon: Why not?

The Witness: Because it is set for a double pack.

Q. (By Mr. Lewis E. Lyon): It is what?

A. It is set for the double pack and the triple pack cans will not fit.

Q. All right. Then let's get a set of double pack cans. We won't have to run it with the triple pack. We have 2-plan [82] cans.

I have taken two cans of the defendant's products from the carton, Plaintiffs' Exhibit 2 to the Hyun deposition of November 11, 1955, and I will ask you if this machine is set so that it will take those cans?

A. No, sir, because I am sure these are 300s, and this is 303. You see the difference in the center (indicating).

Q. All right. Pardon me. We will take the other two. A. That is a 307.

Q. That is a 307? A. Yes, sir.

Q. Here are a pair of 303 cans, which I will separate, and ask you to tape together at the opposite ends. That will eliminate the presence of tape. Will it work on these cans?

Now, while you are waiting, let's thread the machine up and tape them at the ends opposite

(Testimony of John W. Kesterson.)

from which they were taped before. When was this machine last operated, do you know?

A. I believe it was operated last night, but I wasn't at the plant.

Q. Was that after hours?

A. It was after our regular hours.

Q. Who was operating it, do you know? [83]

A. No, I don't, because I wasn't in the plant at the time.

Q. Was the plant operating—— A. Yes.

Q. ——on a regular production?

A. I don't get what you mean by that.

Q. I mean, were you actually filling, and canning, and labeling? A. No, just packaging.

Q. Was this a test operation that was performed last night? A. No.

The Court: He said they were packaging.

The Witness: No, regular packaging.

Q. (By Mr. Lewis E. Lyon): Regular packaging. On what particular product was it operating?

A. On the double pack, 2-in-1 deal.

Q. On the 2-in-1 deal? A. Right.

Q. That is as illustrated by this Exhibit 11?

A. Yes.

Q. It wasn't operated at all this morning, to your knowledge? A. Not to my knowledge.

Q. Has it been changed or altered in any way since it [84] was operated last night until you brought it in here? A. No, sir.

Q. While we are waiting for that plug, I will ask you some other questions. Starting with this

(Testimony of John W. Kesterson.)

Exhibit 11, when did the defendant first start to pack the 2-in-1 pack, as illustrated by Exhibit 11, with that label?

A. I would say approximately June of this year, 1955.

The Court: Now, let's interrupt the proceedings while the workmen try to adjust this. You want to make certain, gentlemen, that nothing happens to our current, so that we will not put the courthouse in the dark here.

The Engineer: We won't do that, your Honor.

Q. (By Mr. Lewis E. Lyon): Is your same answer with respect to the time when you started to use the label on Exhibit 12,—June of this year?

A. Yes, sir.

Q. 1955? A. Yes.

Mr. Lewis E. Lyon: Do you have any records—does the defendant have any records to establish the date of the delivery of the particular labels as shown on Exhibits 11 and 12? They are under subpoena, and I will ask if they can be produced at this time.

Mr. Harris: That is all we have, counsel, at this time. We haven't had an opportunity to completely check our files [85] since yesterday afternoon late, when we got the subpoena, but these are the only records we have now. We are still searching.

Q. (By Lewis E. Lyons): I will place these before the witness and ask him if he can tell me whether these records show the date of receipt of

(Testimony of John W. Kesterson.)

the labels like those contained on Exhibits 11 and 12, or 11 or 12?

Mr. Harris: That is objected to on the ground there has been no foundation laid that this witness knows anything about these records.

The Court: You can find out. Overruled.

Mr. Lewis E. Lyon: He is the plant manager.

The Court: All right. Let's go on, gentlemen. We are moving very slowly, I am sorry to say.

Mr. Lewis E. Lyon: I am sorry.

The Court: All right.

The Witness: What was the question?

Q. (By Mr. Lewis E. Lyon): The question was: Is there any record here which shows the date of delivery, or date of use of Exhibits—like Exhibits 11 and 12, or 11 or 12?

A. I can't see a delivery slip. I can say an approximate delivery date.

Q. What was that approximate delivery date?

A. April 23rd.

Q. Of 1955? [86]

A. Oh, not on these. No, this is on something entirely different.

Q. He says this is on something entirely different. As far as I can see, there is nothing here on this particular item.

There was a delivery ticket received with the labels like Exhibits 11 and 12 at the defendant's place of business, was there not?

A. I assume there was, yes. I don't receive them.

(Testimony of John W. Kesterson.)

Q. Who is in charge of those records?

A. I couldn't say that either, because that is handled through the front office, and I have nothing to do with that.

Q. Do you know who printed the particular labels, Exhibit 11 and 12?

A. Since we have been buying from Louis Roesch Company, I would imagine they do.

Q. Do you know where the product of the defendant, and the labels, Exhibits 11 and 12, have been distributed?

A. No, sir, because I am not in the shipping department.

Q. Now, prior to the use of these labels, Exhibits 11 and 12, on the cans, what was the label that preceded that?

A. What do you have reference to? What label preceded it?

Q. Well, on this type of can you had a prior label, did you not? [87] A. On the type can?

Q. Yes. A. Yes.

Q. And what was that prior label?

A. Well, on this particular size cans, we have labels, several labels, the chow meins and the chop suey and the noodles.

Q. Yes. But you had a different color combination earlier. What was that one? Is that illustrated by some of the exhibits over here? For example, is Exhibit 15 illustrative of the type of label that was used by the defendant prior thereto?

A. We used the type label prior to this, yes.

(Testimony of John W. Kesterson.)

Q. How much prior? A. I would say——

Q. Did the one immediately follow the other?

A. That's right.

Q. That is, 11 and 12 immediately followed 15; is that correct? A. Yes.

Q. And as to 15, on the different products, was the name of the particular vegetable stew which was in the bottom can; is that correct?

A. Yes, sir, and on the noodle label, too.

Q. And on the noodle label, too. All right. Now, when was this one cent sale type of can first offered to the [88] public, and that is as illustrated by Exhibit 15.

A. Well, that would have to be a guess.

Mr. Harris: I object to the witness guessing.

The Court: You cannot object to your own witness guessing. He is your own manager. Go ahead and tell us, as near as you can.

The Witness: I would say some time in '49.

Q. (By Mr. Lewis E. Lyon): All right. Now, with the one cent sale on there?

A. I don't remember that, truthfully.

Q. Will you look at this list of documents that have been produced, and see if you can identify a delivery date for that label, that is, the one with the one cent sale across the face of it, Exhibit 15?

A. I don't see anything here.

Q. There was a delivery ticket received for those labels, was there not?

A. I would assume there was.

Q. Prior to the use of this label with the one cent

(Testimony of John W. Kesterson.)

sale across the face of it, was the same label used without that imprinting of the one cent sale across the face of it?

A. We did have, yes, the plain contents, but it was in a different size can.

Q. In a different size can?

A. I don't believe that—we do have just the plain [89] chow mein-noodles without the one cent sale, yes.

Q. Was that used prior to the one cent sale sign, that label? A. Yes.

Q. And when was that label used without the one cent sale across the face of it?

A. Ever since I have been with the company.

Q. The label, without the one cent sale sign being printed over its face, is like the label on the lower can; is that what you mean?

A. What do you mean, like the label on the lower can?

Q. The label on the lower can is a yellow label of some configuration, except for the illustration of the noodles on the top label.

Mr. Harris: That calls for a conclusion of the witness. The labels speak for themselves.

Mr. Lewis E. Lyon: It is only for identification.

The Court: On the second question, which called for the witness' previous answer, he did not seem to want to commit himself. Go ahead.

The Witness: Well, I just wanted to have an understanding of exactly what your question meant. It could be the label without the one cent sale.

(Testimony of John W. Kesterson.)

Q. (By Mr. Lewis E. Lyon): Yes, that is what I am referring to. [90] A. Yes.

Q. And you had the label without the one cent sale sign across its face for the chow mein-noodles, did you? A. That's right.

Q. And you also had that yellow type of label for the other products, such as the vegetable chop suey, the beef chow mein, and the chicken chow mein, did you not?

A. I don't recall the color background for the different products unless I would see them before me.

Q. I see. Now, just when was it that you adopted that one cent sale label?

A. Truthfully, I don't remember. I couldn't even hazard a guess.

Q. You have no way of determining?

A. Not unless I saw some type of record.

Q. You have no independent recollection?

A. No, sir.

The Court: He has already so stated.

Mr. Lewis E. Lyon: Pardon me.

The Court: I think we ought to recess and let the workmen organize this at leisure, so that we will not interfere with them and they will not feel rushed. Then you can call me back as soon as you gentlemen are ready.

Mr. Lewis E. Lyon: Thank you, your Honor.

(A recess.) [91]

The Court: All right.

Mr. Lewis E. Lyon: It appearing, your Honor,

that we are still engaged in taking pictures of the machine, and it further appearing that the machine for some reason is broken down and will require fixing, we will probably save time, for the court and everybody concerned, including the witnesses, if we adjourned at this time until morning, to get the machine back in running order, so that we can demonstrate it and get the picture taking out of the way. [92]

* * * * *

Wednesday, November 23, 1955; 10:00 A.M.

The Clerk: Case No. 17,882-Y, Chun King Sales, Inc., et al., v. Oriental Foods, Inc., further trial.

Mr. Lewis E. Lyon: Ready.

Mr. Harris: Ready.

The Court: Is our machine working?

Mr. Harris: Yes, your Honor, the machine is now in operating order.

The Court: Shall we go on?

Mr. Lewis E. Lyon: Yes, your Honor, let's do that.

The Court: I think that would be better. Then we can be through with the demonstration, and we will now move closer to the machine.

JOHN W. KESTERSON

the witness on the stand at the time of adjournment, resumed the stand as a witness under Section 43(b), and having been previously duly sworn, testified further as follows:

(Testimony of John W. Kesterson.)

Direct Examination—(Continued)

The Court: All right. Let us go on, gentlemen.

Mr. Lewis E. Lyon: I have two pairs of cans here. Which ones do you want him to work on? Two pairs of defendant's cans. Which ones do you want him to work on,—Jan-U-Wine? [95]

Mr. Harris: Either one. I don't care.

Mr. Lewis E. Lyon: All right. Which ones do you want?

(The machine was turned on.)

Mr. Lewis E. Lyon: Let the record show that the witness pulled the tape out and cut it off underneath the knife.

Mr. Harris: Let the record show that the witness put two cans in the machine, turned the switch, and the cans were rotated and came out sealed.

* * * * *

Mr. Lewis E. Lyon: I would like to have this first pair of cans marked as an exhibit next——

The Clerk: That will be Exhibit No. 22. [96]

Mr. Lewis E. Lyon: ——22, which is the first pair of cans which the witness passed through the machine.

(The item referred to was marked Plaintiffs' Exhibit 22, for identification.)

The Court: You didn't show me the cans closely before they were put together, so that I might see the little—what do you call them—the dents, or, the beads.

(Testimony of John W. Kesterson.)

Mr. Lewis E. Lyon: The beads on the end?

The Court: Yes.

Mr. Lewis E. Lyon: The beads on the end, your Honor, are identical to the beads that are on the free ends of the cans.

The Court: I see.

Mr. Lewis E. Lyon: The bead is what sticks out on this side, which overlies the periphery of the cylinder.

The Court: In other words, one of the cans is wider than the other; is that it?

Mr. Lewis E. Lyon: No, they are both wider at the bead than they are at any other point.

Mr. Harris: If the court please, may I caution court and counsel against pressing the tape down on the cans.

The Court: I am not touching it at all. I merely wanted to make sure that I understood what you meant by the bead. I didn't see them, and I didn't know whether you meant the regular overlap, or what. [97]

Mr. Lewis E. Lyon: It is a regular flange, your Honor.

The Court: A regular flange, or whether it was something special that enables them to be put together.

Mr. Lewis E. Lyon: Now, the second pair of cans that the witness put together, which are the ones with the yellow label, I will ask be marked in evidence as Exhibit 23.

The Clerk: What is the difference?

(Testimony of John W. Kesterson.)

Mr. Lewis E. Lyon: This is the first one he put together, and I identified this second one as the yellow label.

The Clerk: Are these offered in evidence?

Mr. Lewis E. Lyon: Yes.

The Court: They may be received.

The Clerk: Plaintiffs' Exhibits 22 and 23 identified and admitted in evidence.

(The items referred to were marked Plaintiffs' Exhibits 22 and 23, and received in evidence.)

Q. (By Mr. Lewis E. Lyon): For the purpose of comparison, I believe that you have already identified Plaintiffs' Exhibit 11. Is this a pair of cans that were taped together in this machine which is before you?

A. No, sir, they are not.

Q. Is this machine used for taping these cans together? A. Yes, sir, it is.

Q. Are there some here that were used for taping it together,—that were taped together by this machine that you [98] can identify over here?

A. Not that I have seen.

Q. Let me see. Let's look at Exhibit 14.

A. I don't believe it was, sir.

Q. All right. Now, let's look at these cans here, which are Exhibits 10, 11 and 12 to Mr. Hyun's deposition of November 10, 1955. Were these done on that machine?

A. I would say they were.

(Testimony of John W. Kesterson.)

Mr. Lewis E. Lyon: For the purpose of the record here at this point, I will say that these three cans, three pairs of cans, Exhibits 10, 11 and 12 to Mr. Hyun's deposition of November 10, 1955, be received in evidence as Exhibits 24, 25 and 26, and I will identify them this way:

The vegetable chow mein intermediate label as Exhibit 24.

The Clerk: Intermediate label?

Mr. Lewis E. Lyon: Yes. Beef chop suey intermediate label as Exhibit 25.

And the chicken chow mein intermediate label as Exhibit 26.

The Clerk: These are Jan-U-Wine's?

Mr. Lewis E. Lyon: Yes.

The Court: They may be so received.

(The items referred to were marked Plaintiffs' Exhibits 24, 25 and 26, and received in evidence.) [99]

* * * * *

Q. (By Mr. Lewis E. Lyon): On Exhibit 24, the tape that was used, was that a stretchable tape?

A. I would say it was, yes.

Q. And it is stretched, is it not, over the two beads at the two ends of the cans? A. It is.

Q. And adheres to the side of the cans on each side of the beads, does it not? A. Yes, sir.

Q. And that was stretched that way by pulling tension on the tape in the machine before you; is that correct?

Mr. Harris: That is objected to as calling for

(Testimony of John W. Kesterson.)

the conclusion of the witness, and no foundation laid.

The Court: Overruled.

Mr. Lewis E. Lyon: I am just asking the question: Is that true?

The Court: This is cross examination. Overruled. 43(b) is cross examination, and you may ask him leading questions, or any questions. Overruled.

The Witness: Well, would you repeat that?

Mr. Lewis E. Lyon: Will you read the question, please? [100]

(The question was read.)

The Witness: If the machine pulls tension on the tape, it would be for that, but that is——

Q. (By Mr. Lewis E. Lyon): The tape is stretched, is it not, on Exhibit 24?

A. Well, I would say it was stretched, yes.

Q. And the tape was put on the cans in Exhibit 24, as you stated, in the machine before you; isn't that correct?

A. I stated I believed it was. I couldn't say for sure.

Q. Now, it appears to be the same as all other cans that pass through that machine, does it not?

A. Not all other cans, no.

Q. Well, the successful ones?

A. We might say successful.

Q. All right. You have stated that it is stretched as it is on the can, isn't it?

A. I would say so.

(Testimony of John W. Kesterson.)

Q. All right. Now, was there any other possible way that it could be stretched on the can in going through that machine except by the machine putting tension on the tape?

The Court: If he knows that.

The Witness: I don't know that it went through the machine. It might have been a can put on by hand.

Q. (By Mr. Lewis E. Lyon): This appears to be identical [101] with the ones that have gone through the machine?

A. Of some. They don't all go through the machine, as you have seen.

Q. When they go through successfully, they appear like Exhibit 24?

A. Yes, somewhat like that.

Q. And that shows that tension was put on the tape to get it stretched that way, does it not?

A. I couldn't answer that.

Q. Why not? A. Because I don't know.

Q. All right. Now, you don't know, then, that this machine in applying the tape to the can puts tension on that tape; is that your statement?

A. That's right.

Q. What does it do? How does it pull the tape under the series of rollers, and over this serrated roller? Does it take a pull to do that?

A. It is stuck to the can, and as the can rotates, the tape is applied to it, that's all.

Q. How is the tape pulled through the machine?

A. By being stuck to the cans.

(Testimony of John W. Kesterson.)

Q. All right. Then the can rolls and pulls on the tape, does it not?

A. It would have to. [102]

Q. And when you pull on the tape, you pull it in tension, do you not?

A. I am sure I couldn't answer that. It might have been rolled on.

The Court: That is argumentative. The witness evidently is not an expert in mechanics or physics, so as to desire to commit himself. He does not desire to commit himself as to what it does do. I don't think it is important. I think the fact is important, not what this witness says it does. Suppose he admitted that it does, I could still find it does not if I am not satisfied it does. So let's not take time unnecessarily. The witness has given you the same answer, and let's move on to some other topic, please.

Q. (By Mr. Lewis E. Lyon): Looking at these exhibits, 22 and 23, would you say that that was a successful operation of taping these cans?

A. No, sir, I wouldn't.

Q. In either case? A. No.

Q. But you say this machine which is before you was used in the line the night before it was brought here; is that correct?

A. That's right, sir.

Q. And it was operating correctly then?

A. I couldn't say that. I wasn't there. [103]

Q. Well, as far as you know, it was operating the same as it always did?

(Testimony of John W. Kesterson.)

A. I didn't hear anybody say any different.

Q. And it was on a commercial line, you say?

A. Yes, sir.

Q. And you, as production manager, haven't had any report that on that commercial line the work was unsatisfactory, have you?

A. I haven't so far, no.

Q. Now, the machine today is doing an unsatisfactory job; that is correct, isn't it?

A. I wouldn't say that would be a satisfactory job on those two particular cans.

Q. All right. Now, what has ocurred on the machine in the interim, do you know?

A. No, sir, I don't know. I don't think anything has. We know that it got out of adjustment bringing it down here, and that is as far as I know.

Q. You think, then, it is just a matter of its being out of adjustment; is that correct?

A. That would be my opinion.

Q. And that out-of-adjustment would be in the manner in which the tape, the plastic adhesive tape was pulled off the roll, would it not?

A. I couldn't answer that. [104]

Q. You don't know? A. No, sir, I don't.

Q. What other out-of-adjustment could there be?

A. Anything in the mechanical line. I wouldn't know that. All we try to do is to get it ready to go. I am not an engineer.

Q. Were you one of the men that worked on this machine last night after it was found to be broken?

(Testimony of John W. Kesterson.)

A. I was one of them, yes, sir.

Q. Who else worked on it?

A. The other gentlemen.

Q. Who were the other gentlemen?

A. I couldn't call their names because I don't know them.

Q. Are they here? A. One is Mr. Peterson.

Mr. Harris: They will both be called as witnesses, and you can cross examine them.

Mr. Lewis E. Lyon: Who are they, then? If I don't know them, I can't examine them. I am trying to establish——

The Court: He has already stated they will both be witnesses.

Mr. Lewis E. Lyon: But who are they?

Mr. Harris: If counsel wants to subpoena them as his witnesses, and call them, all right. I think it is out of order. [105]

The Court: Oh, I think he is entitled to know who the witnesses are.

Mr. Harris: Yes, the witnesses are Mr. Ivan Peterson and Mr. Orville Johnson.

The Court: All right, gentlemen, let's go on.

Q. (By Mr. Lewis E. Lyon): I place before you Exhibits 14 and 15. Do these appear to be taped on that machine?

A. They appear to be.

Q. How long has this machine that is before you been used by the defendant in taping cans?

A. Since approximately September, of '54.

(Testimony of John W. Kesterson.)

Q. Has it been set up to take different sizes and different styles of cans during that period?

A. Yes, it has.

Q. What different sizes and styles?

A. It has been set up to take two 303 by 406 size, and it has also been set up to take one 303 by 406, and two 303 by 113.

Q. Those different size illustrations you have given are illustrated, respectively, by Exhibits 22—— A. That is right.

Q. ——and 24; is that correct, sir?

A. Yes, sir.

The Court: This machine is a standard machine, and it [106] isn't specially made, is it? You merely adjust it?

The Witness: As far as I know, sir, no sir. It is merely a change of adjustment.

The Court: You merely adjust it to the size of your cans——

The Witness: That is right, your Honor.

The Court: ——depending on what run you have?

The Witness: That's right.

The Court: I assume you run one size at one time, and then readjust for a different size; is that correct?

The Witness: Yes, sir.

Q. (By Mr. Lewis E. Lyon): Isn't this true, that, so far as you know, this is a special machine made especially for this purpose, and not a machine of general use?

(Testimony of John W. Kesterson.)

Mr. Harris: Excuse me. The question is indefinite, your Honor, as to what counsel means by "this purpose."

Mr. Lewis E. Lyon: I mean for applying tape in this manner,—for taping cans in this manner.

The Witness: As far as I know, that is what it is for.

Q. (By Mr. Lewis E. Lyon): You never saw any similar machine used in any other place, did you? A. No.

Q. Or on any other cans other than this Chinese American type food?

A. I have never seen another machine used like this. [107]

Mr. Lewis E. Lyon: That is all.

Mr. Harris: May I ask one question, your Honor?

The Court: Surely, you may ask him any questions.

Cross Examination

Q. (By Mr. Harris): Mr. Kesterson, when you demonstrated the operation of this machine, Plaintiffs' Exhibit 21, for identification, that is here in court, approximately how fast did the cans rotate while the tape was being applied?

A. Well, truthfully,——

Mr. Lewis E. Lyon: I object on the ground that he has not been qualified to answer that question.

The Court: Oh, any man operating that machine can testify as to its speed, just as any man on the street can testify as to speed, whether he drives a car or not. Speed is an estimate made visually,

(Testimony of John W. Kesterson.)

and a man who runs a machine can estimate how many turns it makes per second, or in whatever method he wants to express it, if he can.

The Witness: I really don't know.

Mr. Harris: That is all.

The Court: That saves us the trouble, then.

Mr. Harris: May this witness be excused?

The Court: This witness may be excused.

(Witness excused.) [108]

The Court: Is counsel through with this machine? If you are through, I suggest that we break the continuity right now, and have a recess so that the people can remove it, and then we will go on with the case. So long as we have broken into the continuity several times, this will be our morning recess.

Mr. Lewis E. Lyon: All right.

The Court: And then we can go to 12:00 o'clock.

Mr. Lewis E. Lyon: Subject to the agreement and identification of the photographs that can be substituted in place of the original machine.

The Court: Then let's take the photographs.

Mr. Harris: The photographs have been taken. There will be no difficulty about that. I saw them taken, so there will be no question.

The Court: Then we will declare a recess, and have the workmen remove the machine, and when they are out of here, we will continue with the case. [109]

* * * * *

JENO FRANCISCO PAULUCCI

resumed the stand as a witness on behalf of the plaintiffs, and having been previously duly sworn, testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Lewis E. Lyon): Mr. Paulucci, I place before you two of your products, I believe. Can you identify these?

A. These are—our one can is our 303 by 406 can of Chun King chow mein-noodles one cent sale combination over a can of Chun King beef chop suey 303 by 406.

Q. And taped together?

A. And taped together, yes, sir.

Q. When was that product placed on the market?

A. Well, the labels that these represent—this particular label here on the noodles came in between our 2-and-1, and our new label now, which just came out.

Q. Now, your 2-and-1 and your new label. Let's get what you mean by that. Exhibit 18 that I have in my hand is an example of the 2-in-1; is that correct? A. Yes, sir.

Q. And the new label is what?

A. The new label is—no, sir—the one way in the back, please. [110]

Q. This one here (indicating)?

A. Yes, sir.

Q. As illustrated by Exhibit 17?

A. Yes, sir. This was—in other words, we came

(Testimony of Jeno Francisco Paulucci.)

out with the 2-in-1 deal in '52, and in the Fall of '53 for approximately a three months period this was introduced.

Q. And by "this," you mean this one cent sale—— A. Yes, sir.

Q. ——item here, which you have in your hand?

A. Yes, sir.

Mr. Lewis E. Lyon: I will ask that this particular can, as identified by the witness,——

The Clerk: Plaintiffs' Exhibit No. 27.

Mr. Lewis E. Lyon: ——be marked and received in evidence as Plaintiffs' Exhibit 27. It is the label bearing the one cent sale panel on the chow mein noodle can, and over a can of beef chop suey with pork.

The Witness: I might add that same can has the 2-in-1 on the top lid.

Mr. Lewis E. Lyon: Painted on the top lid, the 2-in-1.

The Court: It may be received.

The Clerk: Received in evidence as Plaintiffs' Exhibit No. 27.

(The item referred to was marked Plaintiffs' Exhibit 27, and received in evidence.) [111]

Q. (By Mr. Lewis E. Lyon): You had a second pair of cans in your hand. Is that of the same vintage and the same characteristics?

A. This is of the same vintage. It is a can of 303 by 406 noodles, with a one cent sale on the face of it, and on the top lid "2-in-1." It is taped

(Testimony of Jeno Francisco Paulucci.)

to a can of our subgum chicken mushroom chow mein.

Q. Did you have a third pair in that series, which included the vegetable chow mein?

A. Yes, sir, we had a third and a fourth.

Q. And the third was what?

A. The third was the can of noodles, with the one cent sale on the face, the 2-in-1 on the lid, taped to a can of meatless chow mein.

And the fourth was a can of rice, 303 by 406, with the one cent sale on the face, 2-in-1 on the lid, and the beef chop suey taped to it.

Q. Now, did those all come out, and were they sold during that three months period that you have before referred to?

A. They were offered during the three months period in the Fall of 1953.

Mr. Lewis E. Lyon: I will offer the second can identified by the witness, and which is the one cent sale type of chow mein noodle can, bearing the one cent sale on the [112] face of the can, and also on the top of the lid, and is taped to a can of subgum chicken mushroom chow mein, as Exhibit 28.

The Clerk: Identified and admitted as Plaintiffs' Exhibit No. 28.

(The item referred to was marked Plaintiffs' Exhibit No. 28, and received in evidence.)

Q. (By Mr. Lewis E. Lyon): Mr. Paulucci, have you had any dealings with anyone with respect to a machine of the general type of machine

(Testimony of Jeno Francisco Paulucci.)

which was here in the courtroom, and is known and referred to sometimes as a Dellenbarger machine, Exhibit 21, for identification?

A. Yes, sir.

Q. With whom did you have such dealings?

A. The Minnesota Mining & Manufacturing firm from St. Paul.

Q. When?

A. As I remember it, in the middle part of 1951.

Q. Was that before or after you moved your plant?

A. The first discussions on the machine, I believe, were before the move. The actual testing of the machine, as I remember it, was after the move.

Q. Did you have a machine?

A. No, sir, we tested a machine.

Q. For how long a period did you test such a machine? [113]

A. I don't recall exactly, but I would say that it may run from a day to two days, maybe as much as a week, but I doubt that it was as much as a week at a time.

Q. For how many weeks?

A. Well, I don't remember exactly, but I would say that we tested a machine possibly three or four different times for a period of maybe one day or two or three days at a time.

Q. Do you know personally whether the machine was of the same construction as the machine that was here in court?

(Testimony of Jeno Francisco Paulucci.)

A. The same general construction.

Q. Do you know that it had the same parts on it?

A. I did not examine this machine.

Q. I see. What were the results of the tests?

A. Very unsatisfactory.

Q. Why were the tests made? Was someone trying to interest your company in that machine?

A. That is kind of a long story. May I relate it?

Q. Go right ahead.

A. We had been taping the cans of noodles to the chow mein, as I related yesterday, since approximately April or May of 1949, and although they were unsuccessful, as far as keeping the two cans together, we were doing it, except for the beef-rice deals, which we had to solder. [114]

The Minnesota Mining people were called in by the writer originally to sell us tape, and to sell us tape alone. They sold us tape, as well as others, whom we bought tape from.

They came to us—and I believe it was Mr. Cronin who is in the courtroom here today—came to us, to a Joseph Scinocca, I believe it was, and offered to help us make a machine, or to furnish us with a machine, I should say, that would cut our cost of labor of putting the tape on.

Mr. Scinocca came to me, and I believe it was Mr. Bingham at that time, too, and advised me of such.

I asked that the next time Mr. Cronin and any

(Testimony of Jeno Francisco Paulucci.)

of his associates come into our plant, that I wanted to see them.

Mr. Cronin came in with either a Mr. Hebert or a Mr. Aldrich, I don't remember exactly, and I told them very plainly, I said, "Look, fellows, we are getting along here halfway decent. If you are going to come in with a machine that is going to help us, and for our purpose alone, we will be very happy to work with you, with the thought that you will sell us more tape. But if you are going to come in here to try to learn from us what we are doing, so that you can use that machine for any other purpose, to sell tape, or to encourage others to sell tape, I want nothing to do with you 'e capito'."

And I told them that because I always say, when I get kind [115] of excited, the Italian words, so that they understand that I mean business.

And they said, "Well, we are doing this as a customer's service to you."

I said, "Will you give me a letter to that effect?"

They said, "Well, we will check with our people, but really it isn't necessary, Jeno. You are a good customer of ours, we want to work with you, we will do everything we can to make a tape machine that will save you money so that you can sell more of these products."

And I said, "With that understanding, then, you go ahead."

And I worked with them. I even had maintenance men—I had a maintenance man stand there

(Testimony of Jeno Francisco Paulucci.)

all day, when they would bring their machine, because usually in a regular run we would have four or five maintenance men in our plant, and they would bring the machine in, and then the men would say, "It don't work, Jeno."

Then they would come back to me and say, "You are not working it right. You are not cooperating with us."

I said, "Okay." So I would get one of our men, —I get Jim Dunham, and so I said, "Jim, give them a maintenance man, and have that maintenance man stand right there all day—if he don't do nothing else—stand there all day and test that machine. These people say they have gone out of [116] their way to help us, and we are not cooperating."

We did that, and we gave them the reports that the machine is unsatisfactory.

In fact, Mr. Bingham showed them something on their machine which was a result of after we had learned how to apply tension to the tape, and how to do it properly, and they brought in their machine, and it was after that that we showed them what to do to their machine in order that it could operate better, with the tension that we were using.

Q. What was that?

A. That was a groove in the wheel. They were coming in with a flat spool, where the tape would go underneath, and the tape would just go around the beads, and it would not go to the contours of the beads on the side walls. And this was after we were applying tension on our manual operation

(Testimony of Jeno Francisco Paulucci.)

that Mr. Bingham said to them, "Look, if you curve them, put a groove in that spool instead, it will help to take it over the contours of the beads, so that with some tension you will get it around the contours of the beads of the can, as it should be. Otherwise, the machine is unsatisfactory."

But in spite of that the machine was highly unsatisfactory, and we discontinued it. Then they had the audacity to go in May to packaging show, and have the machine, that machine, with cans of Chun King there, and telling the public [117] who went there that Chun King was using this machine, and made a representation to other people to that extent.

And so I wired them, and I told them that they had no right to do that, it was contrary to our agreement, and I even called their sales manager, and all he gave me was a lot of double talk, so, as we say in Italian, a froabuttilli.

Q. Where was this show?

A. It was a packaging show of some sort.

Q. Where?

A. I don't know. I think it was in Atlantic City.

Q. Do you recall when it was?

A. I think it was about in May of 1952.

Q. For the purpose of definitely establishing the date when your company acquired the labels with the little cartoon characters, showing the time of use, you have obtained copies of invoices upon which those labels were first delivered, and I will hand you those invoices and ask you if they estab-

(Testimony of Jeno Francisco Paulucci.)

lish the date when you first obtained that type of label.

I place before you three sets of invoices, with attached labels, and ask you if you obtained those labels from the Aegis-Crockett Company of San Francisco, California? A. Yes, sir.

Q. Are these invoices—do you recognize these invoices as duplicates of the invoices upon which you received those labels? [118]

A. I don't recognize them exactly, because it is so long ago, but they are certified here, and I take it they are the same ones.

Q. I note the delivery date, as set forth on these invoices, is January 1, 1954, and that the delivery of the first 1,000 labels of each of the three, that is, the vegetable, the beef, and the chicken chow mein was via Emery.

What is Emery?

A. I believe that that is the airline. It must be a freight airline, because it says "Emery Freight," and it was shipped on that date.

Q. Do you recall that these were shipped by air?

A. Yes, we requested a rush shipment by air, and then the balance of the shipment, as is shown there, P.I.E., was shipped by truck, I believe.

Q. Is this date of January 15, 1954, as stated on these invoices, the date that you recall for the delivery of those labels by air? A. Yes, sir.

Q. Why did you have them delivered by air?

A. Well, you see, the National Canners Convention is held in Atlantic City every other year, and

(Testimony of Jeno Francisco Paulucci.)

this year it was held in Atlantic City, and we were going to announce these new divider packs to our brokers at a dinner there, and we [119] also, of course, wanted to show them the products there, and cut them for them, as well as to customers who came to the convention. So it was all important that these be shipped, so that we could have them for the convention, which I believe started January 19th.

Q. And that accounts for the small amount of 1,000 labels on this air shipment, does it?

A. Yes, sir, that is correct. 1,000 would take care of approximately, I guess, 80 cases, and that was enough for our purpose, to get the trade and the brokers, and everybody acquainted with these products, with an all-out dinner that we have there, and announcement, and so forth. And then we needed them for trade releases to the various trade papers, and so forth, so the labels went for that purpose also. [120]

* * * * *

Q. (By Mr. Lewis E. Lyon): In a general way, what success, if any, have you had with these taped pack sales?

A. Most excellent. Our business actually has been [121] referred to as one that has been built on tape.

Q. Well, since you developed this tension method of taping, has your business increased in the sale of those taped cans, or decreased?

A. Considerably increased.

(Testimony of Jeno Francisco Paulucci.)

Q. By considerably, give me a general idea. Has it doubled?

The Court: Give us a number, either in number of items sold, or in dollar value, but just in general.

Mr. Lewis E. Lyon: One or the other.

The Court: Just in general terms.

The Witness: Then may I refer to my notes?

The Court: Yes.

Mr. Lewis E. Lyon: Yes, you may.

The Witness: From approximately $2,000,000—this was prior—well, during that 1951 period, to approximately we expect $10,000,000 this year.

Q. (By Mr. Lewis E. Lyon): What was it last year? I don't want expectations.

A. Last year it ran over six million. Our rate of increase now is running approximately 40 per cent. Well, the volume—the way it is running, it will run around approximately ten million this year.

Mr. Lewis E. Lyon: I see. That is all. You may cross examine. [122]

Cross Examination

Q. (By Mr. Harris): Mr. Paulucci, what was your sales volume of taped products in 1949?

A. Mr. Harris, I was talking about total volume.

Q. Total volume of product?

A. Yes, sir.

Q. What was your total volume in 1949?

(Testimony of Jeno Francisco Paulucci.)

A. I am speaking of fiscal years. Our total volume in 1949 was approximately 1,250,000.

Q. What was your total volume in 1950?

A. Approximately two million.

Q. And in 1951 it was two million?

A. No, sir. In 1951, as I mentioned, the fiscal year ending—the ending of the fiscal year of 1951 was approximately three million and a half.

Q. When does your fiscal year end?

A. The 1st of June. Well, in that instance it was the 1st of June of 1952.

Q. And in 1949, approximately what percentage of your gross volume of sales was in taped product? A. That I cannot tell you.

Q. You were selling other products, were you, in 1949? A. Yes, surely.

Q. In 1950 what was the percentage of your sales of [123] taped product in proportion to the sales of the other products?

A. I do not know.

Q. In '51? A. I do not know.

Q. In '52? A. I do not know.

Q. In '53? A. I do not know.

Q. In '54? A. I do not know.

Q. Your volume of taped product in 1949, however, was very substantial, was it not?

A. Would you say substantial—comparatively to what?

Q. Well, you sold 1,000 cases of taped product in 1949?

A. Yes, we sold more than 1,000 cases.

(Testimony of Jeno Francisco Paulucci.)

Q. And more than 1,000 cases in 1950, didn't you? A. Yes, sir.

Q. And more than 1,000 cases in '51?

A. Positively.

Mr. Harris: I produce two photographs, which I ask be marked as Defendant's Exhibits A and B, for identification.

The Clerk: Defendant's Exhibit A is a picture, a close-up of hands taping cans. Defendant's Exhibit B is a photograph [124] of several women taping cans.

(The documents referred to were marked Defendant's Exhibits A and B, for identification.)

Mr. Harris: I exhibit these to opposing counsel.

The Court: All right.

Q. (By Mr. Harris): Mr. Paulucci, I hand you Defendant's Exhibits A and B, for identification, and ask you do those photographs show an ordinary commercial operation in the plaintiffs' plant?

Mr. Lewis E. Lyon: That is objected to on the ground it is indefinite as to time, your Honor.

Mr. Harris: We will find that out in a minute.

The Court: He can ask about time. Overruled.

The Witness: Well, Mr. Harris, these are our products, and I don't recognize any of the girls. Our shipping cases are there, so I would presume these photographs were taken in our plant, yes.

Q. (By Mr. Harris): Do you know when those photographs were taken in your plant?

A. No, sir.

(Testimony of Jeno Francisco Paulucci.)

Q. Do those photographs show the production line in your plant at the present time, as it is now in your plant? A. No, sir.

Q. Do they show the production line as it has been at any time in your plant? [125]

A. Well, it is very similar. It is very similar as it was at one time.

Q. What time was that, Mr. Paulucci?

A. Well, right after we moved into the new plant. It looks like it. Just a minute. I am trying to orient myself here. The difficult part in my trying to identify these for you, counsel, is the fact that on these cans we have neither the "one cent" nor the "2-in-1," and, therefore, it is very difficult for me to place any approximate date as to when these were used. But from the looks of the cartons there, I presume that it was after we moved into the new plant.

Q. Referring you to——

A. Yes, I am quite sure that this was after we moved into the new plant.

Q. Referring you to Exhibit A, for identification, I note in the lower left-hand corner of the photograph there appears to be a circular object with the word "Scotch" on it. Would that be Scotch tape, or the Scotch brand tape?

A. It could very well be. I mean, that is the box the Minnesota Mining uses to ship the tape in, yes.

Q. When did you stop purchasing industrial

(Testimony of Jeno Francisco Paulucci.)

tape for this taping operation from Minnesota Mining & Manufacturing Company?

A. I don't recall that at all. I do—I would like [126] to enlighten you, that these containers are used for many other purposes other than for tape around there. They might be used for stickers, and such, so that that would not have a bearing as to whether the tape at that time that was being used was Minnesota Mining tape.

Q. Referring you to Defendant's Exhibit A, for identification, the operator who has the two hands in the lower right-hand corner of the photograph, she is taping two cans together, is she not, manually? A. Yes, she is.

Q. And in doing that, she is using an angle iron or V-shaped trough to hold the cans?

A. She has her hand over it, but, evidently,—yes, we see one end over here, and I would say yes.

Q. By "over here," you are referring to Defendant's Exhibit B, are you?

A. That is correct.

Q. And in both views she is also employing a tape dispenser, in which the tape is held on a roll; is that correct? A. That's correct.

Q. And in Exhibit A the operator is either just about to, or just has got the tape off on the cutter on the dispenser; is that right?

A. It is very difficult — she either has, or is about [127] to, as you say, because it is very close to the cutter, and she has tape on her finger, so it

(Testimony of Jeno Francisco Paulucci.)

is very difficult to say whether it is below the cutter or parallel to it.

Q. And referring to Exhibit B, for identification, as early as 1949 the plaintiff, Chun King Sales, Inc., was taping cans by the use of, first, a trough, a V-shaped trough or angle iron, similar to that shown in that exhibit, was it not?

A. Yes, sir.

Q. And by a tape dispenser such as is shown in that exhibit? A. Yes, sir.

Q. And in the same relationship?

A. Well, I would say so. I mean, there is a matter of distance here, which has fluctuated at times, but I would say yes.

Q. And that equipment was used in 1949 to tape two cans together in end-to-end relationship, wasn't it?

A. I wouldn't say this equipment here, Mr. Harris, but the equipment you have described, yes, sir.

Q. That was done in the ordinary course of commercial operation of your business, was it not?

A. Yes.

Q. And the same thing is true of the year 1950, is it not? In other words, you were using equipment such as you and [128] I have described during the year 1950 commercially there at your plant?

A. As you have described, using an angle iron or some kind of a trough, as you call, and a dispenser.

Q. And you were using similar equipment there in 1951, prior to July, were you not?

(Testimony of Jeno Francisco Paulucci.)

A. Yes.

Q. And starting in 1949, how did the girls use that equipment to tape cans together?

A. By wrapping the tape around it.

Q. Well, how did they use it? With reference to the views in these photographs, just tell the court how the girls went about taping two cans together in 1949.

A. As I remember it, the lady here would take the tape, she would put the two cans into the angle iron, she would take the tape and loosen it from the dispenser over to the bead of the two cans, or the two beads, and then she would loosen the tape, and just rotate or roll the cans into the tape and tab it off.

Q. Did she hold the tape to put any tension on it as she was rolling the cans?

A. She did not.

Q. How did the operators in 1949 get the tape to go on the cans smoothly?

A. It was not smooth. [129]

Q. Was it ruffled?

A. I would say that that is a good word for it, yes, sir.

Q. The edges were ruffled?

A. Which edges, sir?

Q. The edges applied to the walls of the can?

A. Not only the edges. The edges would not get ruffled so much as the tape itself around the—you are talking about the edges. I am talking about the tape itself would become ruffled.

(Testimony of Jeno Francisco Paulucci.)

Q. Yes, I am talking about the tape itself, too, but I am talking about what part of the tape would become ruffled.

A. Well, if you will show me a piece of tape, I will be happy to show you.

The Clerk: Here is a piece of Scotch tape here. (Handing to witness.)

The Witness: Here—this is what they used.

Q. (By Mr. Harris): I show you, Mr. Paulucci, Plaintiffs' Exhibits 22 and 23. Do those exhibit ruffling, such as you have referred to?

A. The ruffling I am referring to is more in here (indicating), in the centers of the tape, where, if tape is put on kind of loose, in a hurry, the roll of the cans will go faster than—it will just ruffle the tape, you know, like a ruffle on a dress; not so much like this. This has [130] had tension applied to it in certain spots and there are ruffles in here. Here are the ruffles in here, you see (indicating).

Mr. Harris: The witness is referring on that to the tape on Exhibit 23.

Mr. Lewis E. Lyon: Let's mark on Exhibit 23 the point which you have referred to as the ruffles. Take a pen here and mark it.

The Witness: It is in here (indicating).

Mr. Lewis E. Lyon: That is right here?

The Witness: Where the big ruffles are through the center, not around the edges; like in here, you see here (indicating), but through the center.

The Court: "Here" and "here" does not mean

(Testimony of Jeno Francisco Paulucci.)

anything. He is merely trying to mark the place that you designated.

The Witness: I see.

Mr. Lewis E. Lyon: I am going to mark an "A," if I can get this pen to work.

Mr. Schroeder: Take a hard pencil, Mr. Lyon.

The Court: Maybe a crayon will work.

Mr. Lewis E. Lyon: I will mark an "A" on the can, and I am going to draw a line from that "A" to the center of the tape at that point. Is that where you mean?

The Witness: I would say so, yes, sir. [131]

* * * * *

Mr. Lewis E. Lyon: Your Honor, at this time I have the photographs here that were taken of the machine, which I have had marked Plaintiffs' Exhibits 21A to 21-G, inclusive, there being seven of them, and I will offer them in evidence, as they are marked, as Exhibits 21-A to 21-G, inclusive.

Mr. Harris: We would like, if the court please, to examine the photographs before they are offered.

Mr. Lewis E. Lyon: I have a set of the photographs for you, too.

The Court: We will both look at them.

Mr. Harris: Perhaps we can look at them in the recess, and not stop now.

The Court: Yes. Let's go on with the examination.

(The documents referred to were marked Plaintiffs' Exhibits 21-A to 21-G, inclusive, for identification.) [133]

(Testimony of Jeno Francisco Paulucci.)

Q. (By Mr. Harris): Mr. Paulucci, before the noon recess you had finished testifying generally, I believe, to the method of the manual taping operation that was done by the plaintiff company, your company, during the year 1949. Was the same method used by it during the year 1950?

A. Yes.

Q. And was the same method used by it during the year 1951?

A. Not the total year, no sir.

Q. The first part of the year it was, however?

A. Up to the time we moved into the new plant, yes, sir, which was approximately August, of 1951.

Q. Will you please describe the method which was used by the plaintiff company, Chun King Sales, Inc., to tape cans together after you moved to the new plant in August of 1951?

A. We applied tension to the tape, so that it went around the contours of the beads in such a way as to touch the side walls and create practically a weld between the two cans.

Q. How much tension did you apply to the tape?

A. Sufficiently to go around the contours of the beads and to do as I just described.

Q. Can you state how many pounds of pull you applied to the tape to apply it that way? [134]

A. No, sir.

Q. The fact is, is it not, Mr. Paulucci, that the only difference between your taping operation after August of 1951, and that engaged in by your com-

(Testimony of Jeno Francisco Paulucci.)

pany prior to July of 1951, was that you put more tension on the tape after August, 1951, than you did earlier?

A. That is not true, Mr. Harris.

Q. What are the facts?

A. As stated to you, Mr. Harris.

Q. Were there any differences in the operation other than the amount of tension applied to the tape?

A. Basically, the amount of tension applied on the tape.

Q. That was the only difference?

A. Yes, sir.

Mr. Harris: I produce two photographs, which I ask be marked as Defendant's Exhibits C and D.

The Clerk: The picture of a woman operating taping of Chun King cans is identified as Defendant's Exhibit C, and a photograph of a pair of hands operating a taping machine with Chun King cans is identified as Defendant's Exhibit D.

(The documents referred to were marked Defendant's Exhibits C and D, for identification.) [135]

* * * * *

Q. (By Mr. Harris): Mr. Paulucci, I show you Defendant's Exhibits C and D, for identification, and ask you if you recognize those as being photographs of a taping machine operated in the plaintiffs' plant at Duluth?

A. Yes. I don't know which exhibit it is, but this one here——

(Testimony of Jeno Francisco Paulucci.)

Q. You are referring to Exhibit C?

A. Yes, Exhibit C. Well, of course, it is very difficult for me to say whether this is in our plant, but these are our cans. Here is a shipping case that is one of ours, and these, too, are our cans, so I would say evidently it would be in our plant, but I cannot say from the pictures that it was our plant.

Q. Do you have any personal knowledge of such pictures being taken in your plant? [136]

A. I know that we had the Minnesota Mining ask for pictures, so that we could guide them more on this machine that they were trying to make for us, and possibly these were the pictures that were taken, but whether or not these were in our plant, I don't know, because I can't get this ladder, where this would fit in the particular room of the taping, or this wall over here (indicating).

Q. However, Mr. Paulucci, did you have at your plant last year a machine of that character, which you tested?

A. We tried to get a machine such as this in order to prepare for this lawsuit, but whether we got it or not, I don't know.

Q. Mr. Paulucci, you have referred in your testimony to a machine which was sent to the plaintiff company, I believe in the latter part of 1951, by Minnesota Mining & Manufacturing Company. It is a fact, is it not, that you had an earlier machine, which was sent to your plant by the Minne-

(Testimony of Jeno Francisco Paulucci.)

sota Mining & Manufacturing Company in late 1950, and early 1951?

A. Not to my memory, Mr. Harris, no.

Q. After this machine that you received in the latter part of 1951, after you had an opportunity to test that, did you receive any further taping machines from Minnesota Mining & Manufacturing Company?

A. Well, they would bring in a machine, and we would [137] test it, and they would take it back and bring it back again, and that ran into the early part of 1952, up until the time we wired them in May of 1952, and at that time we certainly severed any transactions with them so far as machines are concerned, because it was contrary to our agreement with them.

Q. That machine you are referring to is the same machine you had off and on throughout that period, is it?

A. From the latter part of 1951, as we described, up to the early part of 1952, yes, sir, the same machine with modifications, where they took it back to try to improve it.

Q. Then following the time that machine was returned to the Minnesota Mining & Manufacturing Company, did you receive from it any further taping machines?

A. Not to my knowledge. As I say, we wrote in to them, or either to the Dellenbarger people, who are their licensees, asking for a machine in order that we could prepare for this trial.

Mr. Harris: No further cross examination.

The Court: Any redirect?

Mr. Lewis E. Lyon: No redirect, your Honor.

The Court: All right, Mr. Paulucci. [138]

* * * * *

Mr. Harris: I stipulate that these photographs accurately show the machine that was here, marked Plaintiffs' Exhibit 21.

The Court: Having seen the machine while it was here, I myself or anybody who has been in the courtroom could, [140] by looking at these, state that they seem to be correct reproductions of the machine which we had upon the press table this morning, taken from various angles. They may be received.

(The documents heretofore marked Plaintiffs' Exhibits 21-A to 21-G, inclusive, were received in evidence.)

[See Book of Exhibits.]

The Court: Now we will allow you to put this witness on out of order.

Mr. Harris: Thank you, your Honor. Mr. Cronin, will you take the stand, please.

GREGORY CRONIN

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your full name, please?

The Witness: Gregory Cronin.

The Clerk: Spell the last name, please.

The Witness: C-r-o-n-i-n.

(Testimony of Gregory Cronin.)

The Clerk: Thank you.

Direct Examination

Q. (By Mr. Harris): What is your residence, Mr. Cronin? A. Bay Village, Ohio.

Q. What is your occupation? [141]

A. Sales supervisor for Minnesota Mining.

Q. Minnesota Mining & Manufacturing Company?

A. Minnesota Mining & Manufacturing Company, yes, sir.

Q. In what area?

A. In Northern Ohio, Western Pennsylvania, and the State of Michigan.

Q. Do you have any man working under you in that area? A. Yes, sir.

Q. How many? A. Eighteen

Q. How long have you been employed by the Minnesota Mining & Manufacturing Company?

A. Thirteen years.

Q. What was your position with the company in the latter part of 1949?

A. Salesman in a part of Minneapolis, and in the northern part of the State of Minnesota.

Q. In the Duluth area? A. Yes, sir.

Q. When did you start to cover the Duluth area?

A. In approximately October, 1949.

Q. In 1949. And since then have you been acquainted with the plaintiff company, Chun King Sales, Inc.? A. Yes, sir.

(Testimony of Gregory Cronin.)

Q. Do you know Mr. Jeno Paulucci, the plaintiff? [142] A. Yes, sir.

Q. You have known him since 1949?

A. I would say possibly since '50.

Q. What was the occasion of your first becoming acquainted with the plaintiff company in 1949?

A. They purchased quite substantial quantities of colored pressure sensitive tape from Minnesota Mining.

Q. What do you mean by "pressure sensitive tape"?

A. That is a tape with a rubber type adhesive, which requires no activator such as water.

Q. Is that sometimes referred to as cellophane tape?

A. That is one of the family, yes, sir.

Q. What, to your knowledge, was that tape used for that was purchased by them through you in 1949 and 1950?

A. It was practically all used, I would say, on what they call a 2-for-1 deal, sealing cans end-to-end.

Q. Sealing cans, did you say?

A. Combining cans.

Q. Did you see that done at the Chun King plant in Duluth? A. Yes, sir.

Q. What was the earliest time that you saw that done?

A. I would say the latter part of 1949.

Q. Did you see it done in 1950?

A. Yes, sir. [143]

(Testimony of Gregory Cronin.)

Q. In taping cans together in the latter part of 1949 and in 1950, did the Chun King Company in Duluth use any apparatus or machinery to do the taping, to assist in the taping?

A. Not machinery. They used a jig, such as—it was a piece of angle iron, and they rotated the cans in that angle iron with the tape around it.

Q. I show you the photographs, Defendant's Exhibits A and B. Does any of the equipment shown in those photographs correspond in any way to anything you saw in the Chun King plant in late 1949 or in 1950?

A. The idea is—the pictures are very, very comparable to the method that they were using in 1949, as to my recollection.

Q. Will you please describe what that method was that you saw at the Chun King plant in late 1949 and in 1950, that they were using there at the Chun King plant?

A. They were using a regular heavy duty, as we call it, heavy duty tape dispenser, which is a standard piece of equipment for us. They had that placed in front of them, rolled the cans in the channel which was several inches beyond the cutting blade of the dispenser, and would roll the machine—roll the cans, which would automatically dispense the tape, and possibly that tape could have been—I will retract that. [144]

Would you repeat that?

(The answer was read.)

The Witness: I wonder, can we just stop?

(Testimony of Gregory Cronin.)

Q. (By Mr. Harris): Well, just go ahead and give your answer, Mr. Cronin.

A. The rolling of the cans unwound the tape from the tape roller, and the rolling of the cans applied the tape to the joined cans.

Q. You mentioned a channel. What do you mean by a channel?

A. That is a sort of a trough, or a guide to hold those two cans in place, so that they would roll easily, with two metal guides on either side to hold them, you might say, laterally.

Q. From your personal observation of this operation in Duluth at the plaintiffs' plant, did the girls, the operators, I should say, or did they not put any tension on the tape, as the tape was being applied to the cans?

Mr. Lewis E. Lyon: That is objected to as leading, your Honor.

The Court: Overruled. This is what he saw there. He may answer.

The Witness: Yes, sir.

Q. (By Mr. Harris): What is your answer?

A. Yes, sir, they put tension on the tape. [145]

Q. How did they do that?

A. By holding that—rolling the cans with one hand and pulling that tape against that can as it was unrolling from the reel of tape is my recollection.

Q. What was the condition of the tape on the cans after the taping operation, in those instances which you observed personally, in 1949 and 1950?

(Testimony of Gregory Cronin.)

Mr. Lewis E. Lyon: That is objected to as leading, grossly so.

The Court: Overruled.

Mr. Lewis E. Lyon: The witness has not testified anything about 1949 and 1950.

Mr. Harris: My questions go back to 1950.

The Court: That is all right. Go ahead. You may answer.

The Witness: I would say it was formed around the bead of the can, and Chun King was always trying to get that to conform around the bead of the can, so there would be no—as was discussed earlier—any ruffling action for merchandising or appearance sake.

Q. (By Mr. Harris): Was it smooth on the cans, or was it not smooth on the cans?

A. To my recollection, it was smooth.

The Court: You were shown that operation because they were using one of your machines, or trying out one of your machines to see how it would work; wasn't that it? [146]

The Witness: Primarily, tape, with just a standardized manual type operation, yes, sir.

The Court: In other words, you were there not as a part of the general public, but you were there as a seller of tape, to whom a customer was showing the way in which he was using your tape on cans; isn't that true?

The Witness: That is right, your Honor.

The Court: All right.

* * * * *

(Testimony of Gregory Cronin.)

Q. (By Mr. Harris): Now, Mr. Cronin, how many times in 1949 and 1950 were you in the Chun King plant observing this hand taping operation?

A. Oh, a minimum of six times, I would say.

The Court: Over what period of time?

The Witness: I would say a year and three months.

The Court: And what was the last time?

The Witness: The year 1950 you asked——

Mr. Harris: And 1949. [147]

The Court: No, no, any time. Any time prior to 1952 from 1949, to, say, the middle of 1952, May, 1952, how many times did you observe that operation?

The Witness: I would say six times a year, which would be fifteen times, possibly.

The Court: I see. You were alone at the time, were you not?

The Witness: Sometimes alone, sometimes with other men from my company.

The Court: From the company?

The Witness: Yes, sir.

The Court: From your company or their company?

The Witness: Always with somebody from their company. Occasionally with somebody from our company.

Q. (By Mr. Harris): In those photographs which you have before you, Defendant's Exhibits A and B, if you will note, one or more of the girls in those photographs has some sort of white mate-

(Testimony of Gregory Cronin.)

rial on her fingers. Do you know what that was? Did you ever see that done at the time you were there at the Chun King plant in 1949 and 1950, girls wearing tape or other material on their fingers?

A. Yes. Occasionally the tape would break. By pulling that back against the combination deal, which was in front of them, but still with the dispenser which had a cutting knife closer to them,—by pulling it against it, they would cut [148] and scratch their fingers.

Q. Did you during the year——

The Court: Tape has a sharp edge. Even if you are taping paper, you can cut yourself very badly, you know, with just a piece of Scotch tape.

The Witness: This was coming back against the dispenser blade, which was causing the cutting.

The Court: I see.

Q. (By Mr. Harris): Was there a knife in the dispenser itself? A. Yes, sir.

Q. And that is the blade that you are speaking of, is it?

A. That is right, a serrated blade. * * * * *

Q. (By Mr. Harris): Mr. Cronin, when did you first have any experience with sticky resilient tape, pressure sensitive tape as you call it, being used on combination deals, to tie together two packages of a product, or two separate products?

A. I myself in 1944, and every year thereafter.

Q. Will you please give some examples of that,

(Testimony of Gregory Cronin.)

briefly? A. Pillsbury Flour Mills.

Q. What were they taping?

A. Cake Mix, along with pan scrapers, plastic can pan scrapers.

Q. To your knowledge—excuse me, go ahead,—anyone else, to your knowledge, using this on combination deals? A. General Mills.

Q. What were they selling?

A. They were selling breakfast foods, Wheaties and Cheerios. They fastened two packages together, along with a comic book, held together by Scotch tape. [158]

Q. Anyone else?

A. Russell Miller Milling, when they went into their cake mix flours had five-cent deals on the cake mix flour.

Q. When did General Mills merchandise products in this manner? A. In 1945.

Q. When did Pillsbury merchandise products in this manner?

A. 1944, and practically every year thereafter.

Q. When did Russell Miller, to your knowledge, first merchandise products this way? A. 1946.

Mr. Harris: That is all. You may cross examine.

Cross Examination

Q. (By Mr. Lewis E. Lyon): All of this merchandise that you have talked about, this flour, these Wheaties, these comic books tied to packages of Wheaties, and forms of cake mixes,—they were in cardboard boxes, were they not? A. Yes, sir.

(Testimony of Gregory Cronin.)

Q. Now, no tin cans were ever tied together before your experience with Chun King, were there?

A. No, sir.

Q. Just a moment, please. You have been in court all [159] morning today, and all day yesterday, have you not? A. Yes, sir.

Q. And you heard the testimony of Mr. Paulucci? A. Yes, sir.

Q. You heard his testimony about the development of a machine for the Chun King Company?

A. Yes, sir.

Q. And that he asked you to come in to discuss the matter with him, when you said that you thought that you might build a machine to carry out their method?

A. I believe that could be correct, yes, sir.

Q. And he told you that he wanted to have nothing to do with it unless you would keep that matter in confidence for the Chun King Company, did he not?

A. That is against—yes, I heard him say that, yes, sir.

Q. And he said, "If you will do that, you can go ahead"? A. I heard him say that, yes, sir.

Q. And that was true, wasn't it?

A. I don't believe that can be true at all, due to the fact that Minnesota Mining will not operate on any exclusive arrangements with anybody, sir.

Q. Did you, as an agent of Minnesota Mining, make that fact known to Mr. Paulucci at that time?

(Testimony of Gregory Cronin.)

A. I certainly do not recollect anything like that. [160] I could——

Q. Now, on cross examination,—I mean on your examination, when you were trying to describe the hand operation, you were speaking of the girls and the manner in which they handled the tape, and you stated at some time or other that the tape was pulled off the roll by rotating the cans and then you stated the tape could have been, and you meant to say the tape could have been cut first; isn't that correct? A. No, sir, I did not.

Q. You had seen it cut first, had you not, at the Chun King Company plant? A. No, sir.

Q. You never saw it cut first at the Chun King Company plant? A. No, sir.

Q. You never saw the tape, the Minnesota Mining tape, cut to definite lengths and used in taping the cans together?

A. Before application on them?

Q. Before application on the cans.

A. Absolutely not, sir.

Q. You never saw the girls put the tape on the can, then pull the tape off from the roll, cut the tape, and then wrap the rest of the tape around the can? A. No, sir.

Q. You never saw that? [161] A. No, sir.

Q. Would you say that wasn't done?

A. I would say that would be impossible, to get two cans to hold together in that manner, without tension.

Q. How many times during the year 1952 were

(Testimony of Gregory Cronin.)

you in the Chun King plant? A. Possibly six.

Q. And during what period of time was that?

A. The first half of the year.

Q. The first half of the year. And you testified with reference to your observation of the packing operation in Chun King, that they were packing the—while you observed it—the 2-in-1 combination offer; is that correct? A. The 2-for-1, yes, sir.

Q. And that is as illustrated by this Exhibit 19 in front of you?

A. Cans similar to that, yes, sir.

Q. Well, I am asking you, was it these cans?

A. I don't know if it was those cans, sir.

Q. Did it have the 2-in-1 label on it?

A. It seemed like they were putting the 2-in-1 label on by hand. It wasn't printed on the label.

Q. Is that the observations that you have testified to about this taping operation, that they were operating on those 2-in-1 labeled cans? [162]

A. Will you repeat that, sir?

Mr. Lewis E. Lyon: Read the question, please.

(The question was read.)

The Witness: On a two-can deal.

Q. (By Mr. Lewis E. Lyon): With the label 2-in-1 on the can?

A. When that was imprinted on their label, I have no idea, sir.

Q. And that is what you saw, when you saw the cans being taped together, isn't it?

A. They had labels that they applied to those cans after their taping job took place.

(Testimony of Gregory Cronin.)

Q. What you mean is they would label these cans after they were taped together?

A. They had labels there at the end of the line, yes, sir.

Q. The cans were labeled after they were taped together?

A. To the best of my recollection, yes, sir.

The Court: I don't know whether the witness understands labeling.

Mr. Lewis E. Lyon: Labeling means putting, which is what we are talking about, putting this paper label around the can.

The Court: Yes.

Q. (By Mr. Lewis E. Lyon): And that is what we are both [163] talking about, isn't it?

A. I am talking about that 2-for-1 label that you discussed sir, and I pointed to this (indicating). This was a special label, sir, this one right here, sir, (indicating).

Q. Well, this is all in one label, is it not?

A. Now it is, yes.

Q. Were they putting that 2-for-1 label on the can?

A. To the best of my knowledge, no, I did not see that. The labels were all on the cans, and the taping was done thereafter.

Q. The labels,—then you saw this 2-in-1 label?

A. Yes, sir.

The Court: That is the point that isn't clear to me, Mr. Lyon.

(Testimony of Gregory Cronin.)

Mr. Lewis E. Lyon: That is the point I am trying to get clear.

The Court: Are you talking about this long piece of paper that goes around the cans, in telling us that this was not on the cans that you saw tied together, or are you telling us that they had small labels they put on after they taped them together?

The Witness: No, sir. No, sir.

The Court: What are you telling us?

The Witness: I am trying to tell the court that they had these cans labeled. They had this can labeled with this [164] label. They would then put this around this can, after this was pre-labeled, but then they would put a sticker on.

The Court: Oh, another sticker on top of that?

The Witness: Yes, sir.

The Court: Of some kind?

The Witness: Yes, sir.

The Court: I see. Then you are talking about two operations. One label that was on around the can——

The Witness: That's right.

The Court: ——which was there before they taped it?

The Witness: Yes, sir.

The Court: And then after they taped them, they put on another sticker?

The Witness: Yes, sir.

The Court: Which corresponded to what is now the printed——

The Witness: The 2-for-1.

(Testimony of Gregory Cronin.)

The Court: ——the printed label; is that it?

The Witness: Yes, sir.

The Court: That was superimposed? Is that a difficult word?

The Witness: I believe that is right, your Honor.

The Court: They superimposed it. That means to put over something else. Then that is the idea.

Q. (By Mr. Lewis E. Lyon): And this was being done at all of these times that you say you were in the Chun King [165] plant?

A. I believe they were done all the time, yes, sir.

Q. Just the way you have testified to?

A. Yes, sir.

The Court: All right. There is one question I want to ask in order to let you clarify, if you can, an answer that you gave to a leading question by Mr. Lyon in regard to something being said about secrecy, or something like that. I am not concerned with that particular question, but what I want to get from you in a direct sense, if I can, is this:

During all this time you were being shown these machines, you were trying to devise for them a mechanical method to apply the tape to two cans, to take the place of the manual method that they had followed; isn't that true?

The Witness: Practically from the beginning of 1950, we went to work on machines——

The Court: That is right.

The Witness: ——to try to do their job mechanically.

The Court: Mechanically, instead of manually?

(Testimony of Gregory Cronin.)

The Witness: Yes, sir.

The Court: By mechanically, you mean by machines with a minimum of labor. Of course, that also requires somebody, but instead of what we call in patent law the complete manual operation?

The Witness: You are right, your Honor. [166]

The Court: And during this entire period, what you were doing is trying one machine after another to convince them that it could be done economically and—well, "economically" is the word.

The Witness: That is right, your Honor. That was a part of the reason for the calls, yes, sir.

The Court: What?

The Witness: That was a part of the reason for the calls, yes, sir.

The Court: And that was the reason for your watching the operation, wasn't it?

The Witness: A part of the reason, yes, your Honor.

The Court: What was the other reason? You say a part. The reason I am asking you that is because you seem to attach some significance to the part.

The Witness: We are always interested in how our tape is performing in the present application.

The Court: You were also interested in the product that you were selling, which is one of your main products, and that is Scotch tape, for which you have a patent, trademark, and everything else, including for the word "Scotch"?

The Witness: That is true.

(Testimony of Gregory Cronin.)

The Court: I know, because I have protected you right here in this court.

Q. (By Mr. Lewis E. Lyon): Now, Mr. Cronin, do you know [167] when these photographs, Exhibits A and B, for identification, were taken?

A. I have no idea, sir.

Q. Were you present? A. No, sir.

Q. Did you ever see the particular operation portrayed in Exhibits A and B?

A. Either exact or quite similar?

Q. Exact.

A. Either exact or very similar ones.

Q. Do you know in what plant of the plaintiff, Chun King, that these photographs were taken?

A. I do not, sir.

Q. Do you recognize the plant?

A. I do not, sir.

Q. Do you know anything about the development of a conveyor for feeding these machines——

A. I do not, sir.

Q. ——for carrying out this operation?

A. I do not, although we might have discussed it.

Q. Do you recall having discussed with Mr. Paulucci the proposition that you thought that Minnesota Mining could aid in the production of a conveyor which would help in carrying out this operation?

A. We do not usually talk about anything——

Q. I didn't ask you about usually.

A. I do not recall, sir.

Q. You have no recollection of any such con-

(Testimony of Gregory Cronin.)

versation. Were you present in the Chun King plant, in either plant, at any time when photographs were taken?

A. I do not recall any time when photographs were taken, sir.

Q. Do you recall a conversation with Mr. Paulucci, or any other person in the Chun King plant, where permission was given to your organization to take photographs for use in conjunction with the development of this machine for Chun King?

A. I recall having conversations with Mr. Chun King relative to photographs. Whether it was on the machine, I do not recall, but it was, naturally, to further our product, plus showing unusual uses for tapes.

Q. Did Chun King ever give you permission to use any photograph for any purpose other than in conjunction with their own business?

A. We would not take pictures just for——

Q. Just answer the question, please.

A. Will you repeat that, sir?

The Court: Read the question, please.

(The question was read.)

The Witness: I do not know. [169]

Mr. Lewis E. Lyon: When was the last——

The Court: You are not in the habit—you seemed to hesitate—you are not in the habit of taking photographs of what might be secrets of one client, and passing them on to the other, so that you can sell tape, are you?

The Witness: Absolutely not, your Honor.

(Testimony of Gregory Cronin.)

The Court: You would not consider that ethical, to do that?

The Witness: Absolutely not.

The Court: Then why did you hesitate to give that answer to the question, as to whether they gave you permission or not? Did they?

Well, you took photographs. What did you use them for?

The Witness: To use it for our own purposes.

The Court: Yes, for their own purposes.

The Witness: We would not take pictures just for their own benefit, sir. We would take pictures with the idea of showing it in trade magazines, the packaging trades.

The Court: As a use?

The Witness: Yes, sir, as a tape use.

The Court: But not for the purpose of disclosing the methods that may be a trade secret, whether patented or not?

The Witness: That is right.

The Court: I want to find out what kind of ethics you follow, you know. [170]

The Witness: We would not show any application, or any means of application, unless we had the sanction.

The Court: You had the sanction of the——

The Witness: Yes, sir, of the company.

The Court: So that, while you do not remember being given permission,——

The Witness: That is right.

The Court: ——you yourself would not ordi-

(Testimony of Gregory Cronin.)

narily take pictures of instruments, and so forth, to pass them on to the trade? You were merely interested in knowing and having photographic representations of an additional use for Scotch tape?

The Witness: That is right, sir.

The Court: You are also a manufacturer of machinery; isn't that true?

The Witness: That is to facilitate, shall we say, the use of some of our Scotch tape.

The Court: In fact, that is why you have the word "Mining" in your title? Scotch tape isn't your only product. is it?

The Witness: "Mining," that would be quite a long story, your Honor. If you have two days,—I don't want to be facetious, but the "Mining" has no reference to our company, hardly, at present.

The Court: All right. [171]

Q. (By Mr. Lewis E. Lyon): Were you present and still employed by Minnesota Mining & Manufacturing Company when they received a wire from Mr. Paulucci, which you heard him testify about, protesting about your showing the machine or making a claim that the machine was in use by the Chun King Company, and asserting that fact to other of your potential customers?

A. I don't recall it, sir.

The Court: You will have to show him that.

Mr. Lewis E. Lyon: If you don't recall it——

The Court: Show him the wire. Of course, he may not be one in authority.

(Testimony of Gregory Cronin.)

Mr. Lewis E. Lyon: That is right.

The Court: I do not know. He has a right to see it, in order to say.

Q. (By Mr. Lewis E. Lyon): While they are looking for the wire, don't you remember discussing with Mr. Paulucci the fact of your exhibiting this machine in a trade show, and the fact that he had sent that wire to your company protesting it?

Mr. Harris: Excuse me. If the court please, which machine is this? We have been talking about three machines here.

Mr. Lewis E. Lyon: Any one of the machines.

The Witness: I don't recall, sir. Any machine of our [172] manufacture, we would feel the customer has no right to tell us whether we can show our machines or not.

Mr. Lewis E. Lyon: Just answer the question, please. That is not the question I asked you.

The Court: Read the question.

(The question was read.)

The Witness: I do not recall either one, sir.

The Court: All right.

Q. (By Mr. Lewis E. Lyon): You recall no discussion with Mr. Paulucci at all?

The Court: He has answered that several times. Let's go on.

Mr. Lewis E. Lyon: He has both of them.

The Court: In view of the telegram, and he has got them both, he says he doesn't remember it. So let's go on from there.

Let me ask you this question: Did anyone in

(Testimony of Gregory Cronin.)

authority, anyone in authority in your company, ever inform you that Mr. Paulucci had objected to any claims being made by you as to the use of a particular machine by his company?

The Witness: I don't recall that, your Honor.

The Court: You don't recall it. That really should foreclose the inquiry.

Mr. Lewis E. Lyon: Yes, if he has no knowledge of any of it. [173]

The Court: If he has no knowledge, and if you want to produce the wire later, all right, but there is no use to take time. I don't think seeing the wire would refresh his recollection,——

Mr. Lewis E. Lyon: No.

The Court: ——because he said he never saw it, and that nobody ever called his attention to it. Is that right?

The Witness: That is right, sir.

The Court: All right. Let's get to the next topic, if any.

Mr. Lewis E. Lyon: Just one moment, please. Let me see Exhibits A and B, please.

(The photographs were handed to counsel.)

Q. (By Mr. Lewis E. Lyon): Are you familiar with the records of Minnesota Mining & Manufacturing Company, and their photographic records? Have you seen them?

A. Am I familiar with Minnesota Mining photographic records?

Q. Yes. A. In regard to what, sir?

Q. Well, in regard to this particular matter.

(Testimony of Gregory Cronin.)

The Court: Show him that. That is too broad a question. He is not in charge of that. He is only one salesman.

Q. (By Mr. Lewis E. Lyon): I will show you Exhibits A and B, and I call your attention to the fact that they carry [174] a file number, A11705-1, and the next A11705-4. A. Yes, sir.

Q. Is that a Minnesota Mining & Manufacturing Company number, to your knowledge?

A. I have no idea. I am not in the photographic department.

Mr. Lewis E. Lyon: Let me see Exhibits C and D.

(The photographs were handed to counsel.)

Mr. Lewis E. Lyon: While this witness is still on the stand, I would like to have produced the balance of this series of photographs, which are the missing numbers of -2, -3 and -6.

Mr. Harris: We don't have them, and we have never seen them.

Mr. Lewis E. Lyon: Do you assert that such were not taken?

Mr. Harris: No, I have no knowledge that they were or were not.

The Court: All right.

Q. (By Mr. Lewis E. Lyon): Do you have any idea, Mr. Cronin, when these photographs, Exhibits C and D, were taken?

The Court: Ask him, first, if he has ever seen them?

Mr. Lewis E. Lyon: He has already been asked that on direct, your Honor.

(Testimony of Gregory Cronin.)

The Court Oh, I see. I am sorry. That is my error. [175] I withdraw the question. He merely denied that he saw the inscription and knew what that meant.

The Witness: Yes, I have seen these pictures.

The Court: I am sorry.

Q. (By Mr. Lewis E. Lyon): Were you present when they were taken?

A. I am confident that I was, sir.

Q. When?

A. Oh, it probably could have been in '52.

Q. What time in '52? A. The early part.

Q. Were these pictures taken at the same time as Exhibits A and B were taken?

A. I don't recall the ones in A and B,—having seen those pictures, sir.

Q. Well, I just had them before you. These are Exhibits A and B. My question is, were all four of these pictures taken at the same time?

A. I don't recall these pictures being taken. I do recall the picture of this young lady on the machine.

Q. How long were these pictures taken before you were transferred to the Ohio District?

A. I would say this was taken in the Winter of either later '51 or '52, and I was transferred in July of '52.

Q. Who was present when these pictures were taken? [176]

A. Well, one of our photographers.

(Testimony of Gregory Cronin.)

Q. What time did you actually undertake your duties over in Ohio? A. July 1, 1952.

Q. Did you move over there at any time earlier than that?

A. I was there around Decoration Day in '52 for a few days.

Q. And at any other time? A. No, sir.

Q. During the transition of your duties from the Northern Minnesota District over to Ohio, did you carry on your duties in one place and stop, and then go over to the other?

A. Yes, sir, although I was only in Ohio for several days prior to July, 1952.

Q. Then you ceased—what I am trying to establish is the latest date in your mind that you were in the Chun King plant. Can you give me that?

A. Oh, possibly June, 1952.

Q. And you were never there after that?

A. No, sir.

Q. And you have no recollection whatsoever of Exhibits A and B, but you do think you were present when Exhibits C and D were taken; is that correct? [177]

A. This looks very familiar. The operator looks very familiar. The place of the machine looks very familiar, where it is placed in proportion to the wall, and so on, the fact that it was a temporary installation here with the siding, which places it possibly shortly after their moving into this place. So I would say that I have seen this one.

Q. And by "temporary installation," you mean

(Testimony of Gregory Cronin.)

that this machine was set up, as shown in Exhibits C and D, for the purpose of making tests; isn't that true?

A. Well, we sent it up there with the idea not of tests, sir, but of permanency.

Q. Well, it was taken out, wasn't it? The Chun King organization ordered it taken out, didn't they?

A. Yes, sir.

Q. Because it didn't work is what they said, isn't it? A. You are right, sir.

Mr. Lewis E. Lyon: That is all.

The Court: Any redirect?

Mr. Harris: Yes, if the court please.

Redirect Examination

Q. (By Mr. Harris): Mr. Lyon showed you Plaintiffs' Exhibit 19, and this pair of cans which has on it the label, "2-in-1 Combination offer," and so forth. Did you ever see such a label on a [178] can in the Chun King plant in 1949 or 1950?

A. I would say the labels that I saw entailed another operation, after they were taped, and that was to put a one cent sticker on it.

Q. Did you ever see that particular label at that time?

A. I certainly can't say that I have, sir.

Q. Actually, Mr. Cronin, do you know personally whatever happened to that first prototype machine that went up to Chun King in late December 1950 or early 1951?

A. I think that we utilized the most of it to build

(Testimony of Gregory Cronin.)

the second machine, the drawing from it, and, also, parts from it.

Q. Now, don't guess, please. If you don't know, say so. But do you know what happened to that machine? A. No, sir.

Mr. Lewis E. Lyon: Let the witness answer the question. The witness was saying that he probably did.

The Court: Let's not argue. You are both arguing too much. Go ahead and answer.

The Witness: No, sir, I don't, Mr. Harris.

Mr. Harris: That is all, your Honor.

Mr. Lewis E. Lyon: What did you——

The Court: But in the last analysis through this entire period you were trying to devise a machine that would [179] do the work, and finally you did not succeed, and whatever machine you had was taken out because it didn't accomplish the results as quickly as the manual—what is the word I want?

The Witness: Applicator.

The Court: ——the manual applicator did?

The Witness: You are right, your Honor.

The Court: All right.

Mr. Lewis E. Lyon: Your Honor, so that there will be no question about it, I have the wire in question, which was an Exhibit 2 in the deposition, and so there can be no question about it, I will ask that it be marked.

The Court: Since the witness is going away, we might as well show it to him.

Mr. Lewis E. Lyon: Yes. I will show him the

(Testimony of Gregory Cronin.)

wire and ask him if he ever saw or heard of that wire.

The Witness: I recall something—some wire coming in to us relative to some complaint, I believe it was. If that is the wire, I have no idea.

The Court: All right.

Mr. Lewis E. Lyon: I will ask that this wire be marked for identification as Exhibit——

The Clerk: 29.

The Court: Have you identified where it came from?

Mr. Lewis E. Lyon: The wire is now—— [180]

The Court: I don't mean that. You say you took it from a deposition. I didn't know whether you took it from a deposition, so we will have to take it by reference.

Mr. Lewis E. Lyon: Yes, your Honor. It is a copy of an exhibit——

The Court: It looks like the original telegram.

Mr. Lewis E. Lyon: It is Exhibit B to the deposition taken May 23, 1955, of Mr. Paulucci, the stipulation in that deposition being that the exhibits could remain in the hands of the attorneys for the parties, so that although the deposition is filed here, the exhibit is still in our hands.

The Court: That is right.

Mr. Lewis E. Lyon: And the wire is a wire from Jeno F. Paulucci, Chun King Sales, Inc., to Minnesota Mining & Manufacturing Company, of May 12, 1952.

The Court: That is all right. You know, we

(Testimony of Gregory Cronin.)

would rather err in having two many identifications than having a cold record.

Mr. Lewis E. Lyon: So would I. I spent three days one time on that.

The Court: ——which did not show where an exhibit came from.

Mr. Lewis E. Lyon: Yes, your Honor. I spent approximately three days looking for one.

The Court: It will be marked for identification.

(The document referred to was marked Plaintiffs' Exhibit 29, for identification.)

Recross Examination

Q. (By Mr. Lewis E. Lyon): One further question: I am placing before you a copy of a letter, which is Exhibit F to the same deposition of Mr. Paulucci, the letter being dated October 16, 1951, which on its face is addressed to Mr. G. C. Cronin, Minnesota Mining & Manufacturing Company, Tape Division, 367 Grove Street, St. Paul, Minnesota, and in that letter it states:

"If you will give us some definite information as to the time when we can expect our first tape machine,"—

I will ask you if you received the original of that letter? A. Yes, sir, I would say I did.

Mr. Lewis E. Lyon: I will ask that this letter be marked in evidence as the plaintiffs' exhibit next in order, which will be Exhibit 30.

The Court: It may be received.

(The document referred to was marked

(Testimony of Gregory Cronin.)

Plaintiffs' Exhibit 30, and received in evidence.)

Mr. Lewis E. Lyon: That is all.

Mr. Harris: I just wanted to ask a question about this last letter, your Honor. [182]

The Court: All right. All I want is the date of it.

The Clerk: The date of this letter is October 16, 1951, from Chun King Sales to Mr. G. C. Cronin.

The Court: All right. All I wanted is the date.

Redirect Examination

Q. (By Mr. Harris): Mr. Cronin, I show you this letter, Plaintiffs' Exhibit 30. Does that change your recollection in any way as to your testimony with regard to a machine being delivered there late in December 1950 or early in January of 1951?

Mr. Lewis E. Lyon: That is objected to as leading, your Honor.

The Court: Overruled. That is all right.

The Witness: No, sir, it does not change any testimony.

Q. (By Mr. Harris): What did that mean to you, when he said "The first machine" in that letter?

A. That means the first machine which would mechanically put the tape around the bead of two cans to make a combination deal.

Q. Did or did not the first machine that went up in December 1950 or January 1951——

Mr. Lewis E. Lyon: I object.

The Court: That is cross examination of your own witness. You can't do that. [183]

(Testimony of Gregory Cronin.)

The Witness: You say the first machine?

The Court: I am willing to have you refresh his recollection, but being disappointed in what he has testified to, you can't do that. He is still your witness.

Mr. Harris: That is correct, your Honor, and I still wanted to refresh his recollection.

The Court: It isn't doing it, and what you are doing is to argue with your own witness to change the implication from his previous testimony, which is not proper,——

Mr. Harris: Very well.

The Court: ——unless you announce you are taken by surprise, and you want to impeach him, you want to impeach your own witness.

Mr. Harris: If there is any implication here that there wasn't a machine supplied earlier, I want to correct that.

The Court: I am not determining what implications there are. I know what you are trying to do, and what you are satisfied with, but you cannot do it in that manner.

Mr. Harris: Very well. That is all, your Honor.

Mr. Lewis E. Lyon: That is all.

The Court: All right. Step down. You can go home now. You are excused.

(Witness excused.) [184]

* * * * *

The Court: All right, gentlemen, call your next witness.

Mr. Lewis E. Lyon: Mr. Hyun, please.

The Clerk: Under Rule 43(b), Mr. Lyon?

Mr. Lewis E. Lyon: Yes, called under Rule 43(b) for the purpose of cross examination.

JAISOHN HYUN

called as a witness by the plaintiffs under the provisions of Section 43(b) of the Federal Rules of Civil Procedure, and having been first duly sworn, was examined and testified as follows:

The Clerk: What is your full name?

The Witness: Jaisohn, J-a-i-s-o-h-n, Hyun, H-y-u-n.

Direct Examination

Q. (By Mr. Lewis E. Lyon): What is your occupation, Mr. Hyun? Is that pronounced right?

A. Yes.

Q. I don't like to mispronounce a person's name.

A. Food processor.

Q. Connected with what organization?

A. With Oriental Foods, Inc. [185]

Q. Are you an officer of that organization?

A. Yes.

Q. How long have you been an officer of that organization? A. Since 1946.

Q. What is your age? A. Thirty-one.

Q. Have you had the same office in that organization since 1946? A. No.

Q. What is your present office?

A. Executive vice-president and general manager.

Q. What was your office in 1946?

A. Secretary.

(Testimony of Jaisohn Hyun.)

Q. Who is the president of that organization?

A. Peter S. Hyun, Sr.

Q. He is your father? A. Yes.

Q. Where is he now located?

A. In Los Angeles.

Q. Is he here in Los Angeles?

A. I presume so. [186] * * * * *

Q. (By Mr. Lewis E. Lyon): Now, Mr. Hyun, Jr., you were [188] also served with a subpoena in this matter, I believe, were you not? A. Yes.

Q. And in that subpoena you were requested to bring in certain things, including the machine which has already been produced, but in that subpoena you were also requested to produce drawings, if any, of that machine. Have you any such drawings?

A. I have to rely on Mr. Harris for that.

Mr. Lewis E. Lyon: Well, are there any such drawings here in response to the subpoena? [189] * * * * *

Mr. Harris: We have here the same drawings that were exhibited to counsel on November 17th, and of which I have made available three copies.

The Court: I am sorry. You are right. There was a jurat here, but it was service by mail. It is not a verified answer.

Mr. Lewis E. Lyon: I didn't think it was, your Honor.

The Court: No.

Mr. Lewis E. Lyon: It is an answer by counsel.

Mr. Harris: We have here a set of drawings which I exhibited to counsel for the plaintiffs on

(Testimony of Jaisohn Hyun.)

November 17th, and out of which they selected three drawings, of which we made copies and delivered them to them. Those are all the drawings that we say cover this machine here in suit, with the exception of some schematic sketches that we have made here for our case, which I shall be glad to show to counsel.

Mr. Lewis E. Lyon: I am not interested in the schematic sketches. I am interested in any drawings which are going to be asserted to be drawings of the machine in question. [190]

* * * * *

Mr. Lewis E. Lyon: I am asking that they produce those that they say are now available, your Honor, so they can be marked, so that we can have an opportunity to examine them. I am not asking for some others that are not here.

The Court: All right. If they want them, place them in the custody of the clerk, for identification, so that they will know those are the ones you claim are the drawings. That may be done.

The Clerk: Do you want those identified as your exhibits, Mr. Lyon?

Mr. Lewis E. Lyon: They can be identified as the exhibit next in order.

Mr. Harris: I am only saying, if the court please, these are drawings of the machine exactly that was here in court. They are the only drawings we have of the machine, most nearly like the one produced in court. [191]

The Court: I am not asking you to stipulate.

(Testimony of Jaisohn Hyun.)

You tell them what you have. I am only asking you to produce what you have, and he can get additional information through your witnesses. You are not required to go beyond what your knowledge is.

Mr. Lewis E. Lyon: They can just be marked in a group as the exhibit next in order.

The Court: All right. [192]

* * * * *

The Clerk: The group of drawings of can banding machine is identified as Plaintiffs' Exhibit No. 31.

(The documents referred to were marked Plaintiffs' Exhibit 31, for identification.) [193]

* * * * *

Q. (By Mr. Lewis E. Lyon): Now, Mr. Hyun, does this Exhibit 32 include all of the records of the Oriental Foods Company which would establish the date of first use of any of the labels of the Jan-U-Wine products here in evidence, including Exhibits 3-A, 6-A, 7-A, 8-A, 9-A, 10-A—3-A which I have in my hand—Exhibits 24, 25 and 26, Exhibits 13, 14 and 15 which I am now exhibiting to you, Exhibits 22 and 23, and Exhibits 11 and 12?

A. I believe those particular records there apply only to four of the exhibits you mentioned.

Q. Do you have such similar records with respect to the other exhibits?

A. I have some additional, yes. In fact, if I may get my briefcase, I will get them now.

Q. Certainly.

(Testimony of Jaisohn Hyun.)

A. I have here some more that pertains to the labels. Not all of the exhibits that you have mentioned.

Q. But these pertain to some of them?

A. Yes.

Mr. Lewis E. Lyon: For this purpose at this time I will [194] ask that this additional record just identified and produced by the witness be marked as Exhibit 33, for identification.

The Clerk: 33.

(The documents referred to were marked Plaintiffs' Exhibit 33, for identification.)

Q. (By Mr. Lewis E. Lyon): I will ask you as to which one of these exhibits this Exhibit 33 refers.

A. May I examine it, because I don't know. It is quite collective.

Q. Yes. The exhibits are here and the records are here, and I would like to have you do it. You can come down, if it will be any more convenient to take the records and the exhibits and look them over.

A. May I do this by elimination and by gathering?

Mr. Lewis E. Lyon: I did not mean to instruct the witness. It is the court's duty, and I should not have made that statement.

The Witness: That information covers these four items,—these four exhibits.

Q. (By Mr. Lewis E. Lyon): You mean Exhibit 33 refers to Exhibits 13, 14, 15, and 23; is that correct? A. Yes.

(Testimony of Jaisohn Hyun.)

Q. All right. Now, you have some other records, have you?

A. I have some others, but I haven't got those so as to [195] bring them with me.

Q. You haven't got them here?

A. They are being gathered now.

Q. They will be available, will they, on Friday?

A. Yes.

Q. All right. Now, you were also asked to produce the records showing each packing carton, and the date of initial use thereof on your beef, chicken and vegetable chow mein and chop suey. Do you have those records?

A. May I ask you, by carton, do you mean packing or shipping cases?

Q. Shipping cartons of this character, exhibited by this packing carton, so that we understand each other. A. Yes, sir.

Mr. Lewis E. Lyon: And I will ask that this packing carton, as I have referred to it, be marked as exhibit next in order, for identification.

The Clerk: No. 34.

The Court: It may be so marked.

(The item referred to was marked Plaintiffs' Exhibit 34, for identification.)

The Witness: I have information, but not covering that here. That also is being gathered.

Q. (By Mr. Lewis E. Lyon): But on prior packing cartons, this is? [196] A. Yes.

Q. And have you samples of these prior packing cartons?

(Testimony of Jaisohn Hyun.)

A. I don't believe samples are readily obtainable. We haven't got any, no.

Q. You don't have them?

A. Not of all of them. We might have some of some of them.

Q. Well, can you obtain what you do have?

A. Yes, I will.

Q. And bring those in? A. Yes.

Mr. Lewis E. Lyon: I will ask that this set of records pertaining to the packing cartons——

The Court: Yes, may be marked for identification.

Mr. Lewis E. Lyon: ——be marked for identification. Just a moment. The clerk is having a little trouble with the last one.

The Court: He will get it.

Mr. Lewis E. Lyon: This is what?

The Clerk: No. 35. Do you want them in one?

Mr. Lewis E. Lyon: Yes. They are records he produced at one time, so put them in an envelope.

The Court: Put them in an envelope, and make them one exhibit.

The Clerk: Bundle of papers re cases marked as Plaintiffs' [197] Exhibit 35, for identification.

The Court: All right.

(The documents referred to were marked Plaintiffs' Exhibit 35, for identification.)

Q. (By Mr. Lewis E. Lyon): Now, do you have other of the records that were requested by the subpoena?

(Testimony of Jaisohn Hyun.)

A. Are there any combination packages that are called for there?

Q. You mean of this early type—so we are talking about the same thing—of this type, you mean (indicating)? A. Yes. [198]

* * * * *

The Court: When do you claim they began using labels imitative of yours?

Mr. Lewis E. Lyon: When?

The Court: Yes.

Mr. Lewis E. Lyon: Well, from 1951 to date. [202]

* * * * *

PETER SMART HYUN, SR.

called as a witness by the plaintiff under the provisions of Rule 43(b) of the Federal Rules of Civil Procedure, and having been first duly sworn, was examined and testified as follows:

The Clerk: What is your full name?

The Witness: My full name is Peter Smart Hyun, Sr. [206]

The Clerk: S-m-a-r-t is the middle name?

The Witness: Yes, sir.

The Clerk: And the last name is H-y-u-n?

The Witness: That's right.

Direct Examination

Q. (By Mr. Lewis E. Lyon): Where do you reside, Mr. Hyun?

A. I live 2426 Marina Drive.

Q. What is your occupation?

A. I am in the canning business, Chinese food.

(Testimony of Peter Smart Hyun, Sr.)

Q. With what company? A. Oriental Foods.

Q. In what capacity are you associated with Oriental Foods?

A. I am the head of the company, so-called president.

Q. How long have you been president and head of the company? A. Ever since we started.

Q. When was that? A. 1928.

Q. Are you active at the present time?

A. Partly.

Q. What do you mean by "partly"?

A. I am semi-retired. [207]

Q. Well, do you carry on your duties as president? A. Yes, I do.

Q. I am handing you a price list carrying on its face the distinguishing notation of "Institutional Sizes Price List, December 29, 1950." I will ask you if that is your price list as of that time?

A. Yes, it is.

Mr. Lewis E. Lyon: I will ask that this price list, identified by the witness, be marked and received in evidence as Exhibit 36.

The Court: It may be received.

The Clerk: Price list of Jan-U-Wine Institutional Sizes is identified as Plaintiffs' Exhibit 36, and admitted in evidence.

(The document referred to was marked Plaintiffs' Exhibit 36, and received in evidence.)

Q. (By Mr. Lewis E. Lyon): On the back of Exhibit 36, Mr. Hyun, is pictured the products of your company; is that correct? A. Yes.

(Testimony of Peter Smart Hyun, Sr.)

Q. And the products there pictured are the products that you were producing as of that time in the institutional sizes; is that correct?

A. I believe some of those are changed, that we didn't quite make the new mat at that time, so we used old mat. [208]

Q. Well, what ones were changed, if any of them?

A. Mostly small sizes were all changed.

Q. Now, this is the institutional sizes that are shown here? A. Yes, sir.

Q. So were there any small sizes in the institutional sizes?

A. No. In fact, this is institutional price list, but we didn't have any large items, so you could see that is retail items that are printed on the back.

Q. I see. So you were offering as of December 29, 1950, the products as shown on the back of that?

A. Yes.

Q. With those labels? A. Yes.

Q. I hand you a "Consumer Sizes Price List, December 29, 1950," and will ask you if this is your price list as of that time? A. Yes.

Q. Does this also show on its back the various products? A. Yes, it does.

Q. And the labels which were used by your company as of that time? A. Yes.

Mr. Lewis E. Lyon: I will ask that this price list, as [209] identified by the witness, be marked and received in evidence as Plaintiffs' Exhibit 37.

The Court: It may be received.

(Testimony of Peter Smart Hyun, Sr.)

The Clerk: Consumer Sizes Price List of Jan-U-Wine, identified and admitted in evidence as Plaintiffs' Exhibit No. 37.

(The document referred to was marked Plaintiffs' Exhibit 37, and received in evidence.)

Q. (By Mr. Lewis E. Lyon): Now, I hand you two further price lists, one for the consumer sizes and the other institutional sizes, dated January 24, 1951. I will ask you if those are your price lists as of that date? A. Yes, I believe so.

Q. And do those show on the back the products and labels that you were offering and using as of that date? A. I don't know for quite sure.

Q. What do you mean, you don't know for quite sure?

A. I didn't make these. My sons made them.

Q. Do you know of any product or label which you were using as of January 24, 1951, which is not shown on the back of either of these January 24, 1951 price lists?

A. That I can't remember. It is quite a bit back.

Mr. Lewis E. Lyon: I will offer these two additional price lists, the consumer price list of the defendant of January 24, 1951, as Exhibit 38, and the institutional sizes [210] price list of January 24, 1951, as Exhibit 39.

The Court: They may be received.

The Clerk: Exhibits 38 and 39 identified and admitted in evidence.

(The documents referred to were marked

(Testimony of Peter Smart Hyun, Sr.)

Plaintiffs' Exhibits 38 and 39, and were received in evidence.)

Q. (By Lewis E. Lyon): Now, I hand you what looks to me like what I would call a tear sheet. The only date on it is the stamped date of Received December 26, 1951, and there is marked in its center, for the purpose of identification, "Cooperative Advertising Mats Available." I will ask you if this is a publication of your company? A. Yes.

Q. As of what date, do you recall? A. No.

Q. Was it on or about December 26, 1951?

A. I don't know.

Q. You have no way of determining when this was published?

A. It is quite a while ago. I don't have that good a memory. In fact, that is not made by me. My son made it, and he died.

Mr. Lewis E. Lyon: I will ask that this tear sheet, which I have identified heretofore, be marked and received in evidence as Exhibit 40. [211]

The Clerk: Plaintiffs' Exhibit No. 40 identified. Admitted in evidence, your Honor?

The Court: It may be received.

(The document referred to was marked Plaintiffs' Exhibit 40, and received in evidence.)

Q. (By Mr. Lewis E. Lyon): Does this Exhibit 40 show the products and labels used by Oriental Foods as of the date when this tear sheet, Exhibit 40, was circulated? A. That I don't know.

Q. I notice on the face of Exhibit 40 a column

(Testimony of Peter Smart Hyun, Sr.)

entitled, "Price Comparisons—1c Sale Deals," and a comparison which shows Chicken—I presume that is chow mein—is that correct? Chicken chow mein, is that correct, in that list, and vegetable chow mein in the second column?

A. Well, it says, "Chicken chop suey."

Q. Or "Chicken Chop Suey," and the other one was "Vegetable Chow Mein"?

A. No, that is vegetable chop suey. You can see that.

Q. Vegetable chop suey. I see.

Both of those were chop suey instead of chow mein. What is the difference between chow mein and chop suey?

A. "Mein" means in noodles in Chinese way of saying, and chop suey means nothing but to cut up and mix, and generally with rice.

Q. I see. Now, in these two columns, reading the first [212] column it says, "Chicken," which would be the chicken chop suey, and at the top of the next column is "Jan-U-Wine,"—that is the name of your product, is it? A. Yes.

Q. And under that is $4.10 a dozen. The next column is "Chun King," and under that is $5.25 a dozen, and after that is "Difference," $1.15 a dozen.

Then the next line is "Vegetable," and that is vegetable chop suey, $2.75 a dozen under the Jan-U-Wine column, and under the Chun King column is $4.45 a dozen, and the difference is $1.70 a dozen.

Did you circulate that? Why did your company circulate that comparison to the trade?

(Testimony of Peter Smart Hyun, Sr.)

Mr. Harris: Objected to as no foundation laid.

Mr. Lewis E. Lyon: If you know.

The Court: Overruled.

The Witness: I don't know we circulate among them.

Q. (By Mr. Lewis E. Lyon): You have stated that this was your tear sheet, which was printed by your company; that is correct, is it not?

A. I believe so.

The Court: If you don't know whether it was circulated, why did you print them? Why did you compare yourself with the other person? That is the point. Why did you have to use Chun King? Why didn't you do as some of the other people do [213] here, say, "We will not be underbid by anybody." Why didn't you do that? Why did you pick out Chun King?

The Witness: Judge, I did not make these. My boy made these, and he, in fact, passed away.

The Court: Do you know why? Did he take it up with you?

The Witness: No, sir.

The Court: Go ahead. Evidently that is all the witness knows.

Mr. Lewis E. Lyon: Yes, I think that is correct. There is no use asking him any questions like that.

(The document was handed to the court.)

Q. (By Mr. Lewis E. Lyon): Mr. Hyun, haven't you always acted as sales manager of your organization?

(Testimony of Peter Smart Hyun, Sr.)

A. No, I just went out and sold it, wherever I could.

Q. Well, you have been active in sales at all times since 1928 to date, haven't you?

A. Not up to date, no.

Q. When did you cease being active in sales?

A. Well, last five or six years.

Q. You haven't done any selling in the last five or six years? A. Well, very little, I did.

Q. How? A. Very little. [214]

Q. In that very little in the last five or six years, haven't you actually handed out yourself copies of Exhibit 40?

A. No, I have been calling on mostly Army and Navy, and they don't buy those one cent sales. That is government sales.

Mr. Lewis E. Lyon: Do you have the samples of the labels that were requested, Mr. Harris?

Mr. Harris: Is counsel asking for the cartons?

Mr. Lewis E. Lyon: The cartons. Well, the labels I asked for first. I don't care which.

The Court: Let us go on, gentlemen.

Mr. Harris: Yes, we have some. I produce a file containing a number of samples of labels in response to counsel's request.

The Court: All right.

Mr. Lewis E. Lyon: I guess I had better have this file marked for identification, before I do anything with it, as Plaintiffs' Exhibit next in order.

The Clerk: File containing various labels of

(Testimony of Peter Smart Hyun, Sr.)
Jan-U-Wine Foods is marked, for identification, as Plaintiffs' Exhibit 41.

(The file referred to was marked Plaintiffs' Exhibit 41, for identification.)

Q. (By Mr. Lewis E. Lyon): I place before you two cans, heretofore marked Exhibit 1 and Exhibit 3 in the deposition of [215] Peter Hyun, Jr., taken November 10, 1955, and ask you, are these your products? A. Did you say Jr.?

Mr. Lewis E. Lyon: Yes, his deposition.

Mr. Harris: Mr. Lyon——

Mr. Lewis E. Lyon: I don't mean that. Pardon me. I am wrong. Strike that, please. That is not Peter Hyun, Jr. That is Jaisohn Hyun. Pardon my error.

Q. The question is, are these your products?

A. Yes.

Q. When were these put out?

A. I don't remember just right, but this was way back in around 1930s we made that label.

Q. How long did you continue to use the labels like on Exhibits 1 and 3?

A. I don't recall that. We used this, and I suppose we had some labels left over, we continued using it until late years, and on some we started using others.

Q. What do you mean by "late years"?

A. Well, late as 1950, I suppose.

Q. That general type of label is shown on Plaintiffs' Exhibits 37, and 36, 38, and 39, is it not?

(Testimony of Peter Smart Hyun, Sr.)

Mr. Harris: That calls for a comparison by the witness. The exhibits speak for themselves.

The Court: No, that is all right. He is a defendant, [216] and quite a lot of latitude is allowed in a case of this kind involving both patent infringement and unfair competition.

Q. (By Mr. Lewis E. Lyon): And, also, on Exhibit 40, that is the same label as shown on all of these exhibits, 36, 37, 38, 39 and 40; isn't that correct?

A. Yes, that is what I say, we might have used up to 1950. Whatever we have left over, we keep using them.

Q. Now, when did you change labels? When did you first make the first change of labels from the labels as shown on these two cans, Exhibits 1 and 3 to the deposition of Jaisohn Hyun? When did you make the first change of labels after these?

A. After these, you mean?

Q. Yes. A. That I don't remember, what date.

Q. Do you have any records which will show when such change was made?

A. I don't know neither. Like I say, I am strictly on selling, and I didn't tend to any administration work or production work in our plant at all. I don't know anything about it, because when I sell, I am a far distance. I am selling. It is two or three months at a time that I don't even come home, so that I don't know very much about the dates of any of those.

Mr. Lewis E. Lyon: I will ask that these two

(Testimony of Peter Smart Hyun, Sr.)

cans, [217] Exhibits 1 and 3 to the deposition of Jaisohn Hyun of November 10, 1955, be marked and received in evidence as the plaintiffs' exhibits next in order.

The Court: They may be received.

The Clerk: The can of Jan-U-Wine vegetable chop suey is identified and received as Plaintiffs' Exhibit 42, and the can of Jan-U-Wine celery is marked and received as Plaintiffs' Exhibit 43.

(The two cans referred to were marked Plaintiffs' Exhibits 42 and 43, and received in evidence.)

Q. (By Lewis E. Lyon): Who in your organization, Mr. Hyun, is in charge of the records, if there are any, and who would know and who is in charge of the changing of the labels from time to time?

A. That is done by mostly my oldest son.

Q. And which one is that?

A. That is Peter, Jr., Peter Hyun, Jr., that is passed away.

Q. I see. Is there anyone else who would know when the changes were made? A. I don't know.

Q. Are there any records in your organization which will show the time of change from one label to another? A. I don't believe so. [218]

* * * * *

JAISOHN HYUN

resumed the stand, having been called as a witness by the plaintiffs under Rule 43(b) of the Federal Rules of Civil Procedure, and having been previously sworn, testified further as follows:

(Testimony of Jaisohn Hyun.)

Direct Examination—(Continued)

The Clerk: This witness has already been sworn.

The Court: He has been sworn, yes.

Q. (By Mr. Lewis E. Lyon): Do you know, Mr. Hyun, how many of the hand-outs like Exhibit 40 were distributed by your company?

A. I wouldn't know accurately.

Q. Well, approximately how many?

A. I wouldn't know. This printing is not coded for date, or anything. [219]

Q. The question was, how many, not the date at the present time. I am going to get to the date.

A. The code would indicate the date, and how many, of which there is no indication on here. I wouldn't know.

Q. To what type of trade was Exhibit 40 distributed?

A. I would say primarily to our brokers, and then to their customers.

Q. I see. So you supplied these tear sheets, Exhibit 40, to your brokers, and they in turn supplied them to their customers; is that correct?

A. I believe that is the way it was.

Q. Now, can you tell me approximately the date when Exhibit 40 was used, or between what dates it was used?

A. I believe it would be some time between 1950 and 1953.

Q. That is as close as you can fix it?

(Testimony of Jaisohn Hyun.)

A. That is the closest, within range, that I can, yes.

Q. When did you first start the one cent sale? It was after 1951, was it not?

A. No, it was in 1949.

Q. All right. Now, does the price which you were quoting give you a hint as to the time when these were used, and the period of time when they were used? A. I can't tell.

Q. Where did you obtain the Chun King price which is [220] referred to in Exhibit 40, or the prices?

A. I don't know. I presume from one of our brokers.

Q. You were cognizant at the time that this was published of the competition between your company and Chun King on the sale of these products; that is true, is it not?

A. I think that is generally true.

Q. And you were both selling the identical——

The Court: Mr. Lyon, I don't think it is necessary to stand in front of the witness.

Mr. Lewis E. Lyon: Pardon me.

The Court: Some witnesses become very nervous, and we do not allow it except when you show them an exhibit. Besides that, then they get to talking to you, and we will have the same difficulty we had last week of not hearing the witnesses at all.

Q. (By Mr. Lewis E. Lyon): You were both selling the same products at the same time; is that correct? A. Similar products.

(Testimony of Jaisohn Hyun.)

Q. They were both Chinese American type of foods? A. Yes.

Q. And they were both generally of the same classification? A. Yes.

Q. That is, chow mein or chop suey, and of the varieties, chicken, beef and vegetable, or mushroom; is that correct? [221]

A. Yes, or meatless.

Q. And you were both engaged in the selling of noodles? A. Yes.

Q. And you were both engaged in the selling of rice, or were you?

A. I don't know if Chun King was packing and selling rice at that time.

Q. Well, you were?

A. We were, yes. I believe we were. I would like to amend that.

Q. I am going to place before you Exhibits 36, 37, 38 and 39, and I will ask you if you can tell me for how long a period with reference to the dates that these exhibits bear that these price lists were used by your company?

A. 1950 and 1951.

Q. I am going to place before you Exhibits 42 and 43, and I will ask you for how long a period of time your company continued the use of those labels, or labels of that type on your products?

A. Exhibit 43, we probably continued to use this possibly through 1953—'52 or '53—this particular product here, which is celery.

Q. What about other products?

(Testimony of Jaisohn Hyun.)

A. Other products perhaps—other products, no, through that date. [222]

Q. Did you discontinue that type of label on your other products, such as the chop suey or chow mein products? A. Yes, we did.

Q. When?

A. Generally, between 1947 to 1949.

Q. Is that as close as you can fix the date?

A. Yes.

Q. You have no records which will establish the date of that change? A. We don't, no.

Q. Now, in Exhibit 41 there was supplied a set of labels, and does that exhibit include samples of labels to which you changed on the chow mein or chop suey products from the type of label shown in Exhibit 43?

A. It represents the second successive change. There was a change from this label to this label (indicating).

Q. From this label to this label, you mean from Exhibit 43 to Exhibit 42? A. Yes.

Q. And what was that change?

A. The color. Exhibit 43 exemplified, most generally, all of our labels for all products, there not being any color difference, just the black and yellow predominantly.

Exhibit 42 illustrates a change to a color, in this particular case dark blue, for vegetable chop suey.

Q. You mean in the semi-circular panel on the front of the label, that in changing from Exhibit 43

(Testimony of Jaisohn Hyun.)

to Exhibit 42, the color of that semi-circular panel was changed; is that correct?

A. Yes, as well as the side panels.

Q. Now, that semi-circular panel had different colors on it for different products; is that it?

A. Yes.

Q. All right. Now, you are stating about the side panel. What about the side panel?

A. The side panel carried the same color as the semi-circular center.

Q. I see. How long did you continue to use that type of label, with those colored semi-circular panels and the colored side panels, colored for the particular products?

A. Probably a year or two.

Q. What particular colors were used for what particular products?

A. Well, we were the first, I believe,——

Q. Just answer the question.

A. ——in our industry to use colors, and we used red for bean sprouts, black for chow mein noodles, light blue for chicken chop suey or chow mein, green for chop suey vegetables and celery, dark blue for vegetables or meatless chop suey or chow mein and celery hearts, red or maroon or [224] magenta for beef chop suey or chow mein.

Q. How long did you continue to use those labels of the semi-circular panels with the different colors for the different products?

A. Approximately a year or two.

Q. Well, when was the last?

(Testimony of Jaisohn Hyun.)

A. We made the next change in 1949.

Q. And what was that change?

A. Principally, a vignette or a pictorial representation of the product contained within the can.

Q. And have you a sample of that label in this Exhibit 41, for identification?

A. Yes, sir. I think they are generally these labels (indicating).

Q. You have picked out this booklet entitled "Label Book," as the change that you say was made to include the vignette of the product; is that correct? A. Yes.

Mr. Lewis E. Lyon: I will ask that this group of labels be marked in evidence as exhibit——

The Clerk: 44.

Mr. Lewis E. Lyon: Let's mark it 41-A, please, because it is out of 41, and that will show its derivation.

The Clerk: Booklet of Jan-U-Wine labels, marked for identification as Plaintiffs' Exhibit 41-A. Are you [225] introducing this in evidence, Mr. Lyon?

Mr. Lewis E. Lyon: Yes.

The Court: It may be received.

The Clerk: 41-A admitted in evidence.

(The document referred to was marked Plaintiffs' Exhibit 41-A, and received in evidence.)

Q. (By Mr. Lewis E. Lyon): With respect to Exhibit 41-A, do you have the records which would

(Testimony of Jaisohn Hyun.)

show when the labels of this type were delivered to your company?

A. Yes, those were introduced the other day. I have additional records here.

Q. I place before you Exhibit 33, for identification, which contains some records which were produced by you, and, also,——

A. No, I believe they were loose papers. Some of the art work.

Q. Exhibit 32, for identification? Let's see if we can keep these back where they belong. Exhibit 33 is not the one that you are——

A. ——referring to.

Q. All right. So we will put that back. Is Exhibit 32 the one that you are referring to, which is in front of you now? A. Yes.

Q. All right. What in Exhibit 32 is the record to which [226] you refer, or the records to which you refer?

A. We started to make these labels in 1949, and the first ones were delivered in 1950.

Q. What part of 1950? A. April and May.

Q. When were the first deliveries made of labels of this type for use on chow mein, chop suey, fried noodles?

A. Beginning in June, 1950, or beginning in May, 1950, May 2nd.

Q. May 2nd? A. Yes.

Q. Which were those? A. Cooked rice.

Q. Well, I asked about chow mein, or chop suey, or noodles.

(Testimony of Jaisohn Hyun.)

A. Well, all of these basic designs apply to all of the products.

Q. Well, specifically, labeled for the product, I am asking for the date of delivery for the first of any of those products, chop suey, chow mein, or fried noodles.

A. The first record I have here is May, 1951.

Q. All right. Now, was that in conjunction with the modification of that label which is illustrated by Exhibit 13, including the 1c Sale across the face of the label? A. I believe so. [227]

Q. You believe so. Are there any labels attached to any of these invoices you are referring to which enables you to be certain as to what label we are talking about? Is there anything on the invoice of 1951, to which you referred, which would identify the particular label, whether it is that like Exhibit 13, to which I referred you, or like the labels contained in Exhibit 41-A?

A. Yes, the chow mein noodles.

Q. Does that show it was the 1c Sale of chow mein noodles, that invoice that you just referred to?

A. No, that doesn't.

Q. Well, do these invoices show specifically when the modification was made to put the 1c Sale across the face of the label? I wish you would look and see for me.

A. We put the "1c Sale" across the label previously to making this series, this new series.

Q. Well, I am talking about that particular label.

(Testimony of Jaisohn Hyun.)

A. I believe you asked me when we put the "1c Sale" across——

Q. That label?

A. And I am saying it preceded that label. We put it on there before that label came out.

Q. All right. Just show me on what that one cent modification was made before the label like Exhibit 41-A came out? You have looked at Exhibits 36, 37, 38, 39 and 40, [228] for a showing of the one cent sale label, have you not?

A. Yes. Exhibit 40 displays a "1c Sale" across the label previous to the new change, is that not so? On the old style we had "1c Sale" across it.

Q. Now, do you know when Exhibit 40 was distributed or used?

A. Yes, I told you before it was some time in 1949 or '50 when we first introduced it.

Q. Have you any record to establish when Exhibit 40 was used.

A. I have here the introduction of our one cent sales, with the date of June 6, 1949.

The Court: All right. He does not need to look at it. If you use it only for the purpose of identifying it, that is sufficient.

Mr. Lewis E. Lyon: Well, I wanted to see what the witness was referring to.

The Court: No, you are not entitled to see it. You are not going to use this as an exploration into all his business. He merely referred to it for a date.

(Testimony of Jaisohn Hyun.)

If you read your question, you will see that you asked for a date, and he merely referred to it for a date, and you have no right to see what he used to refresh his recollection. I am not going to allow you to explore unnecessarily into this man's business. [229]

Mr. Lewis E. Lyon: I am not wanting to explore.

The Court: Then that is all the inquiry I am going to let you make about this folder. He merely used it to give you a date. Proceed from there.

Furthermore, by the nature of your inquiry, you are turning this into an accounting. I am not going to sit here and hear an accounting, and have you give details of an accounting.

Mr. Lewis E. Lyon: No, your Honor, I am not trying to establish an accounting.

The Court: All right. Then proceed from there. He has given you a date. That is sufficient. Proceed from there.

Q. (By Mr. Lewis E. Lyon): Now, can you establish the date when you put the one cent strip modification in the type of label included on Exhibit 13?

A. We can establish that by the records that are coming from the original lithographer.

Q. You mean those records are not here?

A. No, they are not here. The reason they are not here, we didn't have them in our office, and so I requested that they give us that information.

Q. Who is that lithographer?

(Testimony of Jaisohn Hyun.)

A. Lehmann Printing and Lithographing Company in San Francisco. [230]

Q. All right. Now, you state that you made the change from the type of label in Exhibit 43 to the type in Exhibit 42, and then to the type of label in Exhibit 41-A, which is this exhibit (indicating). Now, what was the next change?

A. I would like to amend one item. Exhibit 41-A took place after a preceding change after 42,——

Q. All right.

A. ——which was actually—I have made them a part of the back of 41-A, which is this series of labels here, in this group.

That was the label that we started to make in 1949, and that set the pattern for the new grouping that we made in 1950, our regular chop sueys and chow meins.

Q. You have picked out four labels in the back of 41-A, which are on a relatively white, shading into a yellow background, and which are for the products cooked rice, Spanish rice dinner, chicken rice dinner, and chicken fried rice dinner; is that correct? A. Yes.

Q. And you say that is the label which on those products intervened between Exhibit 42, and the other yellow background labels in 41-A; is that correct?

A. They preceded. They were the first of the series. In other words, they were all made together.

(Testimony of Jaisohn Hyun.)

Those were the first ones manufactured and delivered. [231]

You see, cooked rice is still a Chinese food item, as well as our chop suey. Chicken fried rice is a Chinese dish that goes with our Chinese line, as well as chop suey.

Q. You did not use this particular type, with the white shading into yellow background, on the chow mein, chop suey, or noodles; is that correct?

A. No, I don't believe so. No, we didn't.

Mr. Lewis E. Lyon: So that the record will show the white, shading into yellow background labels, which I have referred to, I will ask that these be marked Exhibit 41-B, there being four such labels for the products cooked rice, Spanish rice dinner, chicken rice dinner and chicken fried rice, all of which are included in an intermediate position in the label book, Exhibit 41-A.

The Clerk: You want to tear them out?

Mr. Lewis E. Lyon: No, don't tear them out.

The Clerk: Such four labels being marked 41-B, 41-C, 41-D, and 41-E, for identification.

(The labels referred to were marked Plaintiffs' Exhibits 41-B, 41-C, 41-D and 41-E, for identification.)

Q. (By Mr. Lewis E. Lyon): How long did you continue to use the yellow background label or labels on the chow mein, chop suey, whether that be beef, chicken, or meatless, and noodles, with the yellow background, included in Exhibit 41-A?

A. Until the middle of 1953. [232]

(Testimony of Jaisohn Hyun.)

Q. What date in 1953?

A. We began work in the first part of '53, and placed the order in July, 1953.

Q. And when did you receive the delivery for this next type of label?

A. In October of 1953.

Q. Now, what was that label?

A. That is what we called our three-pound label.

Q. Which one? Is it in Exhibit 41?

A. Yes, they are in Exhibit—no, they are on the exhibit on the table there.

The Court: Will you step down, then, and point to it?

The Witness: 6-A, 7-A and 8-A.

Q. (By Mr. Lewis E. Lyon): Were those labels all delivered at the same time? A. Yes.

Q. And that was when?

A. In October of '53.

Q. All right. Now, what was the next change in labels that was made?

A. The next change was the result of effort that we had put through, even before we started that one, beginning in 1952, about May, 1952 to September of 1954, at which time we had completed the necessary art work and placed an order for a new series. [233]

Q. What was that new series?

A. That new series we referred to as the triple pack, and they are also in evidence, and also in Exhibit 41, with a black tape. Those items (indicating).

Q. You mean like Exhibits 24, 25 and 26?

(Testimony of Jaisohn Hyun.)

A. Yes.

Q. And that first came out when? When were the labels of that type first delivered?

A. In October of '54.

Q. And when was that product first placed on the market? A. In October of '54.

Q. What time in October?

A. Around the 20th.

Q. All right. Now, what was the next label change?

A. The next label change was in February of '55.

Q. And what was that label change?

A. On the three-pound beef chop suey and a 303 size beef chop suey.

Q. Do you have label samples showing that change?

A. I believe they are in that Exhibit 41.

Q. Exhibit 41 is——

A. Isn't that the label? No, here it is, this one, and the label identical, except larger in size.

Mr. Lewis E. Lyon: I will ask that this one, which has [234] been pointed out by the witness, and which is a label of beef chop suey, be marked as Plaintiffs' Exhibit 41——

The Clerk: 41-F.

The Court: There are several here. Has this been admitted? Has this volume been marked?

Mr. Lewis E. Lyon: Oh, yes, Exhibit 41.

The Court: Oh, we are still talking about Exhibit 41?

(Testimony of Jaisohn Hyun.)

Mr. Lewis E. Lyon: Yes.

The Court: That is all right.

The Clerk: 41-F is included in that.

Mr. Lewis E. Lyon: Is included in 41-A, for identification.

The Court: They may be received.

The Clerk: 41-B, 41-C, 41-D, 41-E and 41-F are admitted in evidence.

(The exhibits heretofore marked Plaintiffs' Exhibits 41-B, 41-C, 41-D, 41-E and 41-F were received in evidence.)

The Court: All the others were in this one folder. I think we can call it a folder.

Mr. Lewis E. Lyon: It is in Exhibit 41-A.

The Court: It is still a part of the group of samples submitted with the folder which is marked Exhibit 41-A. If we keep taking them separately, there will be nothing left except the folder.

Mr. Harris: We won't have any records left either, your [235] Honor.

The Court: I am going to protect you against an undue record. That is my object. I still think there is such a thing as privacy, and that a lawsuit, especially between two such hotly competitive competitors, should not be used for that purpose. I am not going to allow him or anybody under the guise of examination to go into unnecessary private affairs of your company.

Mr. Harris: Thank you, your Honor.

The Court: Even without your objection, and you know that.

(Testimony of Jaisohn Hyun.)

Mr. Harris: Thank you, your Honor.

The Court: All right. Let's go on.

Q. (By Mr. Lewis E. Lyon): You say this Exhibit 41-F was adopted in 1955. What time in 1955?

A. You mean, used for the first time?

Q. Yes. A. In March.

Q. What time in March? A. March 7th.

Q. All right. Now, what was the next change after Exhibit 41-F?

A. There was no other change, except the arrival, of course, of new labels for new products based on the same design. We have made no changes since then.

Q. Now, at what time do your records show did you first [236] pack the combination of labels as shown on Exhibit 10-A? A. In October of '55.

Q. What time in October of '55?

A. Throughout the month.

Q. All right. Is your answer the same with respect to Exhibit 9-A, and the combination of labels on that? A. Yes.

Q. That is October of 1955? A. Yes.

Q. Is your answer the same with respect to the combination of labels and the pack as illustrated by Exhibit 3-A? A. Yes.

Q. That is October, 1955? A. Yes.

Q. How long prior to October, 1955 was it that you had been familiar with the Chun King pack and labels, as illustrated by Exhibits 3, 9 and 10?

A. About a year and a half.

(Testimony of Jaisohn Hyun.)

Q. How long before you brought out the pack, as illustrated by Exhibits 6-A, 7-A and 8-A, which I have segregated and placed over on the side, was it that you were familiar with the Chun King packs and labels as illustrated by Exhibits 6, 7 and 8?

A. About six months.

Q. When first do you records show, if they do, when [237] you first brought out labels showing across their face "2-in-1," as illustrated by Exhibit 11? A. In June of this year.

Q. How long before that had you been familiar with the Chun King 2-in-1 combination sales and label as illustrated by the label I have just placed in front of you, which is Exhibit 18?

A. About six months.

Q. You are familiar with the Chun King pack, illustrated by Exhibits 27, 28, and the additional two of meatless chow mein, also bearing the one cent sale label, which I have placed before you, are you not?

A. Very definitely. Very definitely. This is where they started to copy us.

Q. I see. And when were you first familiar with that product?

A. The products themselves?

Q. The product in that can?

A. The product in that can. First familiar with it?

Q. Yes.

A. I imagine as soon as they started.

Q. Well, when were you first familiar with it?

(Testimony of Jaisohn Hyun.)

A. About 1949, on.

Q. What time in 1949?

A. About the middle, the middle of 1949. [238]

Q. Would you say the middle is June?

A. Well, June is the middle, yes.

Mr. Lewis E. Lyon: In order to complete this series, your Honor, I will ask that this additional one of this series, which has not heretofore been marked, be marked as Exhibit 44. This is the Chun King chow mein noodle-meatless chow mein one cent sale combination offer.

The Clerk: Admitted in evidence, your Honor?

The Court: It may be received.

The Clerk: Plaintiffs' Exhibit 44, identified and admitted in evidence.

(The item referred to was marked Plaintiffs' Exhibit 44, and received in evidence.)

Q. (By Mr. Lewis E. Lyon): You were asked to produce samples of your packing cartons. I believe that you are now utilizing packing cartons of the type of this packing carton that I place in front of you; is that correct? A. Yes.

Q. When did you start using that type of packing carton? A. June 29th, of this year.

Mr. Lewis E. Lyon: I will ask that this packing carton, just identified by the witness, be received in evidence as Exhibit 45.

The Court: It may be received. [239]

(The item referred to was marked Plaintiffs' Exhibit 45, and received in evidence.)

Q. (By Mr. Lewis E. Lyon): Does that same

(Testimony of Jaisohn Hyun.)

answer, of June of this year, apply to the packing carton, Exhibit 34?

A. No, that was September of this year.

Q. 34 was September of this year? A. Yes.

Q. Now, do you have a further packing carton, for the mushroom chow mein, which I place in front of you,—— A. Yes.

Q. ——bearing a panel on the side of it. When was that first used?

A. In September of this year.

Mr. Lewis E. Lyon: I will ask that this additional packing carton be marked and received in evidence as an exhibit.

The Court: It may be received.

The Clerk: The knocked down carton of Jan-U-Wine mushroom chow mein has been identified as Plaintiffs' Exhibit No. 46, and admitted in evidence.

(The item referred to was marked Plaintiffs' Exhibit 46, and received in evidence.)

Q. (By Mr. Lewis E. Lyon): Do you have an additional packing carton of this type, having a blue panel on it? A. Yes, we have. [240]

Q. Will you produce that, please?

Mr. Harris: We have here, if the court please, a large group of additional packing cartons, which I produce and hand to counsel.

The Court: I think rather than gaining time, we are moving very slowly now.

Mr. Lewis E. Lyon: I am almost finished on this matter, your Honor.

The Court: What is that?

(Testimony of Jaisohn Hyun.)

Mr. Lewis E. Lyon: I am almost finished.

The Court: I was going to say, if you want to pick them out,——

Mr. Lewis E. Lyon: I can pick them out during the recess, your Honor.

The Court: Then let's have a short recess.

(A short recess.)

Q. (By Mr. Lewis E. Lyon): Mr. Hyun, I place before you a periodical entitled, "Commercial Bulletin." Are you familiar with that? A. Yes.

Q. That is a publication in your industry dealing with the wholesale distribution of food, is it not?

A. Yes.

Q. It is published here in Los Angeles, is it not?

A. I believe so, yes. [241]

Q. It is published weekly? A. Yes.

Q. You have advertised in that publication from time to time over the years, have you not?

A. Yes.

Q. In the issue of August 31, 1951, you announced the one cent sale, did you not, as shown by the advertising panel in the lower left-hand corner?

A. We announced that it was going on. We didn't announce the introduction of it in this particular ad.

Q. Well, wasn't that approximately the introduction of it?

A. No, sir. No, it is very descriptive. This method of packing side by side is what we called a can carrier. A can carrier to the one cent sale

(Testimony of Jaisohn Hyun.)

was after our taping of the cans together end-to-end, which began in June of 1949. I can't seem to convince you of that fact, but it is a fact.

Q. Do you have any advertising literature or other literature that will show the first offering of that? A. Yes, I do have.

Q. Where is it? A. I have here——

Mr. Lewis E. Lyon: So that the record will be clear—pardon me just a moment—I will ask that this page 19 of the August 31, 1951 issue of the Commercial Bulletin be marked [242] as an exhibit in evidence.

The Clerk: So that the record may be straight, and taking these things in order, we have previously identified an empty carton of Jan-U-Wine chow mein noodles as Plaintiffs' Exhibit 47, for identification only.

(The item referred to was marked Plaintiffs' Exhibit 47, for identification.)

The Clerk: And this page 19 of the Commercial Bulletin will, therefore, be numbered as Plaintiffs' Exhibit 48. Is it in evidence?

Mr. Lewis E. Lyon: I am offering it in evidence, yes.

The Court: It may be received.

The Clerk: In evidence.

(The document referred to was marked Plaintiffs' Exhibit 48, and received in evidence.)

The Witness: I have here a short file, which includes a memo from the company indicating a special one cent sale, and it refers to, "Jan-U-Wine

(Testimony of Jaisohn Hyun.)

Brand Chicken Chop Suey and Jan-U-Wine Brand Chow Mein Noodles, vertically taped together as one unit. You buy the one can at the regular price, and the can of chow mein noodles for only one cent." It is accompanied by a little promotional sheet that, as we indicated in the memo, was to be included in each case, and we set a quota for those cases.

The Court: Is this an interoffice communication, or [243] is this sent to distributors?

The Witness: It is the latter, your Honor. It is a memo to our sales personnel, which included internally and our brokerage.

The Court: And the brokers?

The Witness: Yes. It indicates the dates of this sale to be June 6th through August 6, 1949.

It also is accompanied with a photograph of the two cans, and also is accompanied by an invoice and a statement from the photographer that he renders for the photographs on June 10, 1949.

Q. (By Mr. Lewis E. Lyon): And where was that distribution made?

A. Primarily, that is initially, within the State of California. Immediately thereafter outside the state.

Q. You mean after August—you mean after the so-called sale was over in the California area in August of 1949, it was continued outside the state?

A. Actually, this sale never did terminate, for, in fact, it is still going on. It has never died. We have pushed it up, pumped it up, called it by different names.